

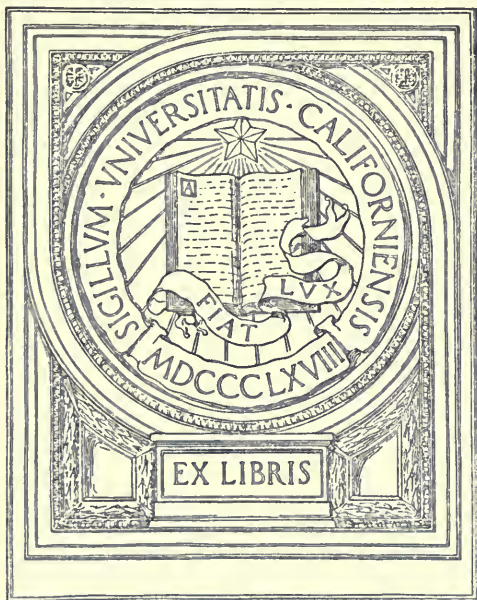
CLASSICS OF THE BAR



VOLUME V

ALVIN V
SELLERS

UNIVERSITY OF CALIFORNIA
AT LOS ANGELES



THE GIFT OF
MAY TREAT MORRISON
IN MEMORY OF
ALEXANDER F MORRISON

70. 1941
ALBANY, N.Y.

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LIBERTY, JUSTICE AND LAW SHALL RULE

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STORIES OF THE WORLD'S GREAT LEGAL
TRIALS AND A COMPILATION OF
FORENSIC MASTERPIECES

BY
ALVIN V. SELLERS

VOLUME FIVE

BAXLEY, GA.
CLASSIC PUBLISHING CO.

1919

THE VIRAL
ABSTRACT

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ABSTRACT TO VIRAL
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The Test and Triumph of The Selective Draft Law

FOR some time after the passage of the Selective Service Act of Congress, of May 18, 1917, there was doubt in many minds as to whether it was consistent with our particular form of government, whether it was not, in some respects, too broad and sweeping to conform to the provisions of our Constitution, an instrument which as clearly limits the powers of Congress as it does the liberties of the individual.

Among the few within the draft age who failed to present themselves for registration as required by the Act were Albert Jones and John Story, who, upon being promptly arrested and imprisoned in the jail of Richmond County, Ga., applied to the Federal Court for writs of habeas corpus, insisting that the Act of Congress was unconstitutional and that they therefore were entitled to their release.

The hearing took place at Mt. Airy, Ga., on Aug. 18, 1917, before one who in brilliancy of intellect approached the great jurists of the world—Hon.

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Emory Speer, Judge of the U. S. Court. Hon. Thos. E. Watson appeared for the petitioners, while Hon. Earle Donaldson, District Attorney, represented the Government.

[Mt. Airy is a celebrated summer resort where Judge Speer was sojourning at the time. No courtroom being available the case was heard out under the spreading branches of the trees in the presence of hundreds of people — many of them ladies — all drawn to that one spot in the Piedmont foothills by the word which had gone forth all through that mountainous country, that the draft law was to be tested there that day, that Judge Speer was to preside, and that "Tom" Watson was to present the case. It will be recalled that no court of competent jurisdiction had up to that time answered the question which was being asked in every State in the Union: *Will the law stand?*

Judge Speer took the case under advisement and, two days later, rendered his opinion denying the writs of habeas corpus. Jones appealed to the U. S. Supreme Court and on Jan. 7, 1918, that greatest judicial tribunal on earth handed down its opinion, affirming the action of the lower court and upholding the Act of Congress in every particular.

We present here for the reader's consideration the argument of Mr. Watson, the decision of Judge Speer, the opinion of the Supreme Court delivered by Chief Justice White, and the Act of Congress the validity of which was being judicially tested.

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The Act, in full, reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized —

First — Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense act approved June third, nineteen hundred and sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law. Vacancies in the Regular Army created or caused by the addition of increments as herein authorized which can not be filled by promotion may be filled by temporary appointment for the period of the emergency or until replaced by permanent appointments or by provisional appointments made under the provisions of section twenty-three of the national defense act, approved June third, nineteen hundred and sixteen, and hereafter provisional appointments under said section may be terminated whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fitness requisite for permanent appointment.

Second — To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

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Third — To raise by draft as herein provided, organize, and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary, and to provide the necessary officers, line and staff, for said force and for organizations of the other forces hereby authorized, or by combining organizations of said other forces, by ordering members of the Officers' Reserve Corps to temporary duty in accordance with the provisions of section thirty-eight of the national defense act approved June third, nineteen hundred and sixteen; by appointment from the Regular Army, the Officers' Reserve Corps, from those duly qualified and registered pursuant to section twenty-three of the act of Congress approved January twenty-first, nineteen hundred and three (Thirty-second Statutes at Large, page seven hundred and seventy-five), from the members of the National Guard drafted into the service of the United States, from those who have been graduated from educational institutions at which military instruction is compulsory, or from those who have had honorable service in the Regular Army, the National Guard, or in the volunteer forces, or from the country at large; by assigning retired officers of the Regular Army to active duty with such force with their rank on the retired list, and the full pay and allowances of their grade; or by the appointment of retired officers and enlisted men, active or retired, of the Regular Army as commissioned officers in such forces: *Provided*, That the organization of said force shall be the same as that of the corresponding organizations of the Regular Army: *Provided further*, That the President is authorized to increase or decrease the number of organizations prescribed for the typical brigades, divisions, or army corps of the Regular Army, and to prescribe such new and different organizations and personnel for army corps, divisions, brigades, regiments, battalions, squadrons, companies, troops, and batteries as the efficiency of the service may require: *Provided further*, That the number of or-

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ganizations in a regiment shall not be increased nor shall the number of regiments be decreased: *Provided further*, That the President, in his discretion may organize, officer, and equip for each Infantry and Cavalry brigade three machine-gun companies, and for each Infantry and Cavalry division four machine-gun companies, all in addition to the machine-gun companies comprised in organizations included in such brigades and divisions: *Provided further*, That the President in his discretion may organize for each division one armored motor-car machine-gun company. The machine-gun companies organized under this section shall consist of such commissioned and enlisted personnel and be equipped in such manner as the President may prescribe: *And provided further*, That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate: *Provided further*, That the President may in his discretion recommission in the Coast Guard persons who have heretofore held commissions in the Revenue-Cutter Service or the Coast Guard and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness.

Fourth — The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force first mentioned in the preceding paragraph of this section.

Fifth — To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section, in addition to and for each of the above forces, such recruit training units as he may deem necessary for the maintenance of such forces at the maximum strength.

Sixth — To raise, organize, officer, and maintain during the emergency such number of ammunition batteries and

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battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary. Such organizations shall be officered in the manner provided in the third paragraph of this section, and enlisted men may be assigned to said organizations from any of the forces herein provided for or raised by selective draft as by this act provided.

Seventh — The President is further authorized to raise and maintain by voluntary enlistment, to organize, and equip, not to exceed four infantry divisions, the officers of which shall be selected in the manner provided by paragraph three of section one of this act: *Provided*, That the organization of said force shall be the same as that of the corresponding organization of the Regular Army: *And provided further*, That there shall be no enlistments in said force of men under twenty-five years of age at time of enlisting: *And provided further*, That no such volunteer force shall be accepted in any unit smaller than a division.

SEC. 2. That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organization embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this act provided, shall be raised by voluntary enlistment, or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft; and all other forces hereby authorized, except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training cadets from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under

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such regulations as the President may prescribe not inconsistent with the terms of this act. Quotas for the several States, Territories and the District of Columbia, or subdivisions thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such State, Territory, District, or subdivision, either as members of the Regular Army or the National Guard. All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged: *Provided*, That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this act. Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

SEC. 3. No bounty shall be paid to induce any person to enlist in the military service of the United States; and no person liable to military service shall hereafter be permitted

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or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.

SEC. 4. That the Vice President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only from those liable to draft as in this act provided, persons of the following classes: county and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other

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persons employed in the service of the United States as the President may designate; pilots, mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency; those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable; and those found to be physically or morally deficient. No exemption or exclusion shall continue when a cause therefor no longer exists: *Provided*, That notwithstanding the exemptions enumerated herein, each State, Territory, and the District of Columbia shall be required to supply its quota in the proportion that its population bears to the total population of the United States.

The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards, and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter pro-

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vided, all questions of exemption under this act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this act authorizing the President to exclude or discharge from the selective draft "Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment, or the effective operation of the military forces, or the maintenance of national interest during the emergency."

The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district.

Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this act, not included within the original jurisdiction of such local boards.

The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the

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President may prescribe, he may affirm, modify, or reverse any such decision.

Any vacancy in any such local board or district board shall be filled by the President, and any member of any such local board or district board may be removed and another appointed in his place by the President, whenever he considers that the interest of the Nation demands it.

The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft.

SEC. 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as afore-said given by the President or by his direction; and any person who shall wilfully fail or refuse to present himself for registration or to submit thereto as herein provided shall

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be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided: *Provided further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

SEC. 6. That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or appointed under regulations prescribed by the President, whether such appointments are made by the President himself or by the governor or other officer of any State or Territory, to perform any duty in the execution of this act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this act by the direction of the President. Correspondence in the execution of this act may be carried in penalty envelopes bearing the frank of the War Department. Any person

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charged as herein provided with the duty of carrying into effect any of the provisions of this act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct.

SEC. 7. That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law for enlistments in the Regular Army, except that recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment; and such enlistments shall be for the period of the emergency unless sooner discharged. All enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this act and which would terminate during the emergency shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment: *Provided*, That all persons enlisted

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or drafted under any of the provisions of this act shall as far as practicable be grouped into units by States and the political subdivisions of the same: *Provided further*, That all persons who have enlisted since April first, nineteen hundred and seventeen, either in the Regular Army or in the National Guard, and all persons who have enlisted in the National Guard since June third, nineteen hundred and sixteen, upon their application, shall be discharged upon the termination of the existing emergency.

The President may provide for the discharge of any or all enlisted men whose status with respect to dependents renders such discharge advisable; and he may also authorize the employment on any active duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed.

SEC. 8. That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grades as may be necessary for duty with brigades, divisions, and higher units in which the forces provided for herein may be organized by the President, and general officers of appropriate grade for the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. Vacancies in all grades in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this act to higher grades

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in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

SEC. 9. That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this act, shall be for the period of the emergency, unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service; and the general commanding any division and higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any commissioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances.

SEC. 10. That all officers and enlisted men of the forces herein provided for other than the Regular Army shall be in all respects on the same footing as to pay, allowances, and pensions as officers and enlisted men of corresponding grades and length of service in the Regular Army; and commencing June one, nineteen hundred and seventeen, and continuing until the termination of the emergency, all enlisted men of

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the Army of the United States in active service whose base pay does not exceed \$21 per month shall receive an increase of \$15 per month; those whose base pay is \$24, an increase of \$12 per month; those whose base pay is \$30, \$36, or \$40, an increase of \$8 per month; and those whose base pay is \$45 or more, an increase of \$6 per month: *Provided*, That the increases of pay herein authorized shall not enter into the computation of the continuous-service pay.

SEC. 11. That all existing restrictions upon the detail, detachment, and employment of officers and enlisted men of the Regular Army are hereby suspended for the period of the present emergency.

SEC. 12. That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations, governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided*, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. -It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both.

SEC. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do every-

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thing by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both.

SEC. 14. That all laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency.

Approved, May 18, 1917.

Mr. Watson's Address to the Court

MAY IT PLEASE YOUR HONOR:

WE are here for no other purpose than to discuss a question of law. We have nothing whatever to do with the politics or the sentimental aspects of the Great War. Those matters have no place in this forum and this case. We are here with one issue only, and that issue is, whether Congress in exercising the Constitutional grant of power

to raise armies has enlarged its own powers and those of the Executive in a manner destructive to other provisions of the Constitution.

Has Congress adopted a method of raising armies which overthrows the Constitutional scheme of government? Does the method of 1917 nullify the system created in 1787? Does the present plan of army increase practically abolish the militia system of the States, which system was in existence when the present Federal Government was formed, and whose continued existence as a necessary part of State machinery is provided for in the Constitution? Is it within the power of Congress to authorize the Executive, by his Proclamation, to fuse the militia with the Regular Army and order it beyond seas for service in foreign lands? Has Congress the power to disintegrate the States by abolishing the essential principles of the States' Bills of Right, thus depriving the States of the sovereign power to protect their citizens in the exercise of immemorial rights?

If the Constitution itself forbids a State to deprive the citizen of liberty, save as a punishment for crime, and if the State is forbidden by its own Bill of Rights to do this, from what source does Congress draw the power to do it? If Congress can assume any one power which was never delegated, but which was on the contrary expressly withheld, what becomes of Constitutional Government?

If Congress can legally make such a law as Sec-

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tion 6 of the Act of May 18, 1917, which places every State officer — from governor down to constable — under the orders of the President, with no definite limits to the President's control of those State officers, and with a penal threat suspended like the sword of Damocles over the heads of those State officers, what becomes of State rights, sovereignty, and independent authority? Under Section 6 of the Act the entire civil administration of the State is subjected to military control and placed under the commands of the President. How can it be contended that such an innovation does not effect a revolution reversing the relative position of the civil and military power, and overthrowing the State's control of its own internal civil administration?

These questions are respectfully suggested in the case at bar; and there is no other tribunal which can authoritatively answer them.

In the very nature of things, Power is grasping. Its innate tendency is to grow. The Constitutional monarch humanly inclines to personal absolutism. Every town council is tempted to become a local Czar. Our sage forefathers, knowing the weakness and the vices of human nature, fixed the bounds of the habitation of the Federal Government and of the States; and to each system the Constitution says, in a spirit of paternal admonition, "*Be content with the orbit assigned you!*"

But because no person can be trusted to act as judge in his own case, and no established authority

can be allowed to define its own limits, our forefathers created the Judiciary. Holding office for life, removed from the accidents of politics, elevated above the clamor of the hour, the Federal Judge is put on guard to protect the Constitutional rights of all — the Federal Government, the States, and the humblest citizen who comes in the hour of his extremity and lays his hand upon the sacred altar of the law.

In this case, your Honor, two poor negroes are the applicants for protection; and in their behalf we say, that Congress has adopted a method of raising armies which not only violates express provisions of the organic law, but which destroys the immemorial rights of the citizen, and revolutionizes the Constitutional scheme of mixed Federal and National government.

We will not now discuss — for it is unnecessary — the various methods by which Congress might legally raise armies, whether by bounties, by employment of mercenaries, by offering inducements to volunteers, by recourse upon the States for the full number of their militia, or other mode: the sole issue here is, did Congress, in May, 1917, adopt a method which the Constitution will not tolerate?

The complainants in this case would have no standing in court, were it not for the fact that our system of government is different from any other and that such questions as are raised in this application for relief hinge upon those very peculiarities

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and complexities which distinguish our Republic from any hitherto known. Our illustrious statesmen have exhausted the resources of language, in describing this novel, this marvelous, this intricately complex system—the One composed of Many, the wheels within wheels, the indissoluble Union of indestructible States.

At the very outset of the discussion we must endeavor to realize fully the controlling power of the fact, that no reasoning based upon analogy, parallel or precedent will be worth the breath which gives it utterance if that reasoning does not conform to the Constitution of the United States. Nothing that any other nation has done, in ancient times or modern, authorizes our Government to adopt the policy of imitation if this adopted policy conflicts with our Supreme Law and with the perfect integrity of the peculiar system of mixed Federal and National sovereignty created by the Constitution.

The very fact that your Honor has taken jurisdiction, to weigh and determine the validity of an Act of Congress approved by the Chief Executive, shows the distinctive nature of our government and advertises the tremendous fact that our Federal Union not only depends upon the separate existence of the three sovereign attributes of government, but that the life-tenure Judiciary is the final arbiter in cases where the citizen alleges that Congress and the President have encroached upon his Con-

stitutional rights. In no other country does one department of the Government thus check and balance the others.

In this country there is no such doctrine as Parliamentary Omnipotence. In our Republic the desires, the ambitions, the prejudices, the passions of the majority — no matter how numerous, rich and powerful — can never deprive the minority of time-honored privileges, immunities and rights, unless the Judiciary prove recreant to its high and sacred trust.

Your Honor! The place you fill today towers in noble importance above that occupied by any monarch on this troubled sphere. You are humbly asked to uphold and preserve the Ark of the Covenant of our Fathers. We come reverently to the Tables of the Law, and seek to have you tell us what is there written.

No greater issue of life or death, of Constitutional liberty or legalized servitude, has ever been presented to your Honor or to any other judge since Moses came down from Sinai. The lives and fortunes of millions of men are at stake. The inherited liberties of our English forefathers are at stake. In countless thousands of homes strong men are suffering more than words can tell, and good women go down on their knees in prayer, while we are here today presenting the case of two poor negroes, whose fate involves that of millions of blacks and whites.

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In a general way we all understand that Anglo-Saxon liberties and institutions originated before there were such things as written Charters and Constitutions. We all understand that our Colonial forefathers claimed these immemorial rights as a portion of their heritage. We are all more or less familiar with the historic tragedy which caused the British-Saxon laws to be overlaid and smothered by the feudal tyrannies of the Norman Conquest; and we yet drink inspiration from the glorious revolt of 1215, which re-asserted the ancient liberties of the realm. It is, or has been, our boast and pride, that these immemorial rights of free men came down to ourselves unimpaired, inalienable, imperishable.

Addressing a District Judge of the United States Court in Atlanta in 1873, the late magnificent lawyer and orator, Benjamin H. Hill, referred reverently to "the sacred civil jewels . . . from an English ancestry, hallowed by the blood of a thousand struggles." Mr. Hill said, "It is infidelity to forget them. It is sacrilege to disregard them. It is despotism to trample upon them."

I congratulate myself and the country that my appeal for the Constitution is addressed to one who learned law in part from the great Georgia Senator, and who, like the Federal Judge whom he addressed in 1873, amid the turbulence and passions of Reconstruction, "possesses the ability to discern, and the courage to declare, the law AS IT IS."

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What are those "sacred civil jewels" to which Mr. Hill referred, and which are treated with such profound respect by English historians, advocates, judges, and standard authorities on Constitutional Law? They form the very Primer of Democracy. They are the Holy Scripture of Patriotism.

No intelligent person denies that these elementary principles embrace life, liberty, and property — carrying protection as well as security to one's person, to one's free choice of vocation, to one's freedom from restraint, to one's acquirement and enjoyment of property and the fruits of one's toil, unless deprived thereof in some manner prescribed by the established law of the land.

Necessarily incident to personal security is the sanctity of one's home, which is inviolate, unless a warrant be sworn out against it.

Fair trial by jury, in the vicinity of one's residence, when accused of crime; freedom to speak one's opinions, and to publish them to the world, with a view to winning to their support the opinions of one's fellow citizens; freedom of religious belief and worship; freedom to keep and bear arms, for the protection of one's life or property; the right to representation in the laying of taxes and the making of laws — all of these are immemorial rights.

Underneath the whole elaborate and powerful structure of our system of government lies the principle which is the exact opposite and irreconcilable enemy of the ancient royal dogma of Absolutism,

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or the Divine Right of Kings. That fundamental democratic-republican principle is, that the People are sovereign; the People are the source of honor, privilege, and power; and all just government rests upon the consent of the People.

Under our system, no Bourbon can say, "I am the State," and act upon that monstrous theory. The State is the people, and the people are the State, and it necessarily follows that in such a system there must be freedom of assemblage, freedom of discussion, freedom of petition.

In his elaborate work, *The State*, published in revised form by Woodrow Wilson, then Doctor of Laws and Professor of Jurisprudence and Politics at Princeton — 1901 — the learned author forcibly and most truly says: "Discussion is the greatest of all reformers. It rationalizes everything it touches. It robs principles of all false sanctity and throws them back upon their reasonableness. If they have no reasonableness, it ruthlessly crushes them out of existence and sets up its own conclusions in their stead."

These ancient rights were not first set forth in the Charters of Henry and John; those rights had been in existence "from time whereof the memory of man runneth not to the contrary."

This fact, immensely important to the consideration of the new laws of 1917, is well stated by Dr. Woodrow Wilson, his then title, in his valuable book, *The State*: "Our own charters and Consti-

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tutions have . . . been little more than formal statements of rights and immunities which had come to belong to Englishmen quite independently of royal gifts or favor . . . And so our own Colonial charters . . . simply granted the usual rights of English freemen. Our constitutions have formulated our political progress, but the progress came first."

Chancellor Kent, Judge Cooley, Sir William Blackstone, and all other authorities with whom I am acquainted, state the same great truth: that the Great Charter of 1215 and its succeeding legislation were nothing but the re-assertion of ancient liberties. Indeed, Blackstone says in his Commentaries, if my memory is not at fault, that nearly all of the remedial laws of modern times consist of the abolition of abuses which were introduced by tyrannical kings.

As everybody knows, our forefathers contended that these ancient English liberties came with the colonists to this country. A seven years' war established that proposition.

The Mother Country acknowledged the independence of Thirteen American States, separately, by name. The old Confederation never issued a Declaration of Independence, and was never recognized by Great Britain. The old Confederation of the Thirteen States had an Army and a Navy of its own; and this Army and Navy were independent of the States. Let us bear that in mind, for the fact has its bearing on the issue now in court.

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The independent, sovereign States composing the Old Confederation select delegates to a Constitutional Convention, commissioned to amend the existing Articles of Union. Instead, the delegates create a new Constitution, and submit their work to the States, for acceptance or rejection. The requisite number of the States separately ratified the new instrument of Union, although North Carolina and Rhode Island did not.

Before their accession to the New Union, what were North Carolina and Rhode Island? There can be but one answer: each of those States was a separate, independent sovereignty, just as Sweden is today. The New Union had its Army, and the two separate States had theirs, consisting of their militia; and the two States were just as fully organized into political entities as Holland and Denmark are at this time.

What surrender did those two States make of their control over this militia when they at length came into the Union? They surrendered nothing of that supreme, sovereign control, except that the Union might use this militia for the general welfare, in case it were menaced by invasion, rebellion, and resistance to the laws of the United States. That is all. What Rhode Island and North Carolina surrendered, the other eleven States yielded — that much and no more.

What is the real character of our Government? Reasoning applicable to other nations fails here.

What Parliament may do in England, is one thing; what Congress may do in the United States, another. We lose our road before we get started if we ignore the dual system of the United States.

Gen. Logan, 1879, said of the United States Constitution: "It cannot have the aspect of both a sovereign nation and a collection of sovereign States. A paradox of insurmountable character is involved in the very idea of such a thing."

In his reply Mr. Hill said: "It is a remarkable fact that just what the honorable Senator from Illinois calls an insurmountable paradox is exactly the Constitution of the United States."

Mr. Hill then proceeds to quote from Mr. Madison's papers in *The Federalist*, and from Mr. Webster's replies to Hayne and Calhoun, demonstrating the mixed character of our system, the Federal Government being national in some respects and federal in others; for instance, the House of Representatives is national, and the Senate, federal; while the Electoral College is partly both.

Mr. Hill rose in one of his flights of oratorical splendor as he described our complex system, evolved from the wisdom and experience of struggling centuries, a system whose model had never existed. He said, "When you hear about a man going to Rome, or to Greece, or to Switzerland, or anywhere, to find models by which to understand the Constitution of the United States, he is going in dark places to gather light."

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Tracing briefly the contest between the two conflicting theories concerning the Constitution, Mr. Hill denounced the extremists of both theories, and he asked this memorable question: "If he is a traitor who would divide the States, how can he be less a traitor who would destroy the States?"

Within its orbit, the National Government is supreme; within their spheres, the States. For example, the State is sovereign over the jury box, and the qualifications of voters; the National Government has no authority except to prevent racial discrimination. Thus the sovereign States have to supply the Federal Government with jurors for its own courts, and with electors for its own elections. In fact, the National Government has no electorate at all; the State not only furnishes the voters, but holds the election.

If the National Government were deprived of State voters and jurors, it would be emasculated; but if the States were deprived of everything coming to them from the Federal Government, they would still be separate, independent, completely organized, and self-sufficient sovereignties.

Unless this undeniable fact is kept in mind, we miss the true understanding of our complex system of Government, the like of which was never before seen in this world.

Students of government have said that our system was not a demonstrated success. They say it is still an experiment. Perhaps they are right. And it

may be that the supreme crisis of the experiment is upon us. God help us to recognize the old landmarks, and to go by them.

I lay down this proposition as the basis of the argument against the new Acts: The Fathers who framed the organic law of our Union were men who were loyal supporters of sovereign States, and who were careful to safeguard the States in the preservation of those sovereign powers not delegated to the Federal Government. Not only does the organic law of the Union say this, in express terms, but that Supreme Law also recognizes the existence in the people themselves of powers which even the States could not lawfully impair.

If I may use the simile — the people are the great reservoir of sovereignty, from which the States draw for their needs. The States expressly gave to the Federal Government a specified portion of this power, so drawn from the reservoir; but neither the Federal Government nor the States have exhausted the source from which their powers were drawn. Always the people remain the rightful heirs of the English liberties which the writers call “immemorial”; and, if some of these inherited rights are not stated in the organic laws, they nevertheless exist, and can be asserted whenever the people see fit.

State or Federal Constitutions, subject to amendment at the popular will, have recently undergone great changes; and it is not improbable that the

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people will draw from the reservoir the power to enfranchise the women, and to prohibit the manufacture of intoxicating liquors.

In dividing sovereign powers between the States and the Federal Government which they were creating, our Fathers took particular pains to protect the States from military encroachment. A student of the Convention Debates, of *The Federalist*, and of the Constitution itself, is struck by that.

In the Philadelphia Convention the dread of military aggression found frequent utterance; and in *The Federalist* the best efforts of Hamilton and Madison were put forth to allay those fears. Again and again Hamilton and Madison reminded their countrymen that the Federal Government could never deprive the States of their power to withstand Federal encroachments because the States would always have control of their militia except when the Federal Government needed it to repel invasion, etc., and that, even then, the State's own officers would remain in command.

The scheme of the organic law of the Union, as shown in the very language used, was that the Federal Government should have an army of its own, and that each State should have a militia system capable of maintaining order, enforcing law, and safeguarding the people from any sudden invasion. The Federal Government has no authority whatever over the State's troops, save in the three emergencies mentioned in the Constitution.

It follows, therefore, that if the new laws of 1917 obliterate this clearly-drawn distinction, and lump the State troops with the National Army, they violate one of the most vital parts of the organic law, and destroy an integral part of the Constitutional scheme. To merge the militia with the regular National Army, is to revolutionize our system of government, and to set up another, totally dissimilar.

Under the Constitution, as plainly written (and as put into operation by President Washington during the Pennsylvania Whiskey Rebellion), no Act of Congress is valid if it deprives the State Governors of their prerogative of naming all the officers and issuing the call for the troops, when the President officially declares his need of them to repel invasion, suppress insurrection, and execute the laws. These provisions were placed in the organic law, out of wisely jealous regard for the reserved sovereignty of the States. Congress has no authority to change them, and the President cannot legally overbear them.

Consequently, the issue before this Court is narrowed to a conflict between the plain letter of the Supreme Law upon the one hand, and, on the other, the Acts of Congress, followed by the President's proclamation which virtually destroys the existence of the State militia.

Another provision of the Constitution was adopted for the declared purpose of safeguarding the States

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and the inherited liberties of the people; and that provision checks the Congressional power to raise a Federal Army, by the two-years limit put on appropriations. As all the Representatives and one-third of the Senators were to be chosen biennially, it was thought that the Federal Government could never maintain a military establishment dangerous to the States and to popular rights.

The recent Acts of Congress spread these military appropriations over a period of thirty years; and therefore we say that the whole scheme, composed of these various recent Acts, is absolutely violative of the Constitutional mandate which forbids that sort of appropriation for a term of more than two years.

It is claimed that "the power to raise armies" vests Congress with plenary powers, and that our Government can raise armies by any method it thinks best. This argument might have weight in England, where Parliament is untrammelled by a written Constitution, and where the Government does not have to lean on sovereign States; but it cannot have any force in this country, before a capable and fearless Judge, who knows that Congress, alone, cannot breathe a soul into statutes; *it is the Constitution which breathes the breath of life into statutes.*

There is here no question of what the Court thinks Congress *should be* competent to do; it is simply and solely a question of what the Constitution

authorizes. Every house-top in America might be turned into a rostrum and resound with clamorous demands for this law, that law, and the other; but an upright Judge, thoroughly versed in the Supreme Law, will heed nothing save the lines in that Golden Book — that casket of the Constitution, which, as Senator Hill said, keeps for us the sacred jewels of our own English ancestry.

Your Honor is requested to take judicial cognizance of the published Acts of Congress and the Proclamation of the President, July 10, 1917; we respectfully contend that these must all be construed together, as forming one inseparable military plan, system, and policy.

These published Acts and the President's proclamation not only abolish the independent State militia, and contravene the clause of the Constitution which prohibits Congress from making appropriations of this character for a longer term than two years, but they destroy the ancient Common Law principle of *ne exeat* and they violate the 13th Amendment.

No English principle was more firmly fixed than that the subject could not be sent out of the realm without his consent. So long as he was innocent of crime, it was his right to abide in his native land. Sir William Blackstone is most emphatic on that point. The King could forbid his subjects to go abroad, but he could not banish them: they had as much right as he to stay at home.

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Your Honor will remember that when Richard II. arbitrarily expelled Henry of Bolingbroke from England, there was great dissatisfaction; and when Bolingbroke returned, the people rallied to him and dethroned the King.

Hon. Hannis Taylor calls attention to the historic fact that, for a thousand years prior to 1776, the law of England had exempted the militia from service abroad, and he cites the statutes I. Edw. III., 26 Geo. III.

Mr. Taylor also quotes the recent statements of President Wilson, who for so many years was Doctor of Laws, and Professor of Law at Princeton.

In an address delivered at New York, January 27, 1916, President Wilson said:

"I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our national defense should be built up and encouraged to the utmost; but, you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the President of the United States the right to ask those men to leave their respective States."

Our militia laws recognize this fundamental personal right, by virtually providing that the Federal Government shall never send the State troops out of the country. To defend our own soil from the

invader, the Federal Government may employ the State militia; to suppress a domestic rebellion; and to enforce the United States laws within the Republic — these are the only purposes for which the State troops may be lawfully used. Every one of those emergencies contemplates SERVICES AT HOME.

The ancient Common Law is a part of our system, so recognized in all the standard authorities and leading decisions. The Constitution did not supersede it, but left it in full force by express provision. (Articles IX. and X. of the Amendments.)

Common Law marriage still exists, and so do many other common law customs and principles, never specifically repealed. In fact, it is to the Common Law we must look, if we would learn what are those "rights . . . retained by the people," in addition to those which they had delegated to the United States and those "reserved to the States."

That there are powers and rights inherent in the people, and not surrendered to the States, or to the United States, the Supreme Law emphatically asserts in the Ninth and Tenth Amendments.

What are those powers and rights? Whatever they are, the people are still the possessors, since they never delegated them expressly or by necessary implication.

Among those retained rights, is that of marriage without license, minister, or ceremonial formality: the highest New York Court has recently re-affirmed

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that doctrine. To the same heritage of Common Law rights, belongs the principle that the citizen cannot be forcibly sent out of his native land.

To sum up the whole matter, we respectfully submit to your Honor, that our Constitutional system, prior to the adoption of the post-bellum Amendments, was intended and designed to form a more perfect Union of sovereign States than the Old Confederation had brought into effect: to establish justice, in accordance with English ideals and institutions; to insure domestic tranquillity by placing under central control the militia of all the States, when internal tumults broke out; to promote the general welfare by a uniform system of laws and administration on matters affecting all the States in common; to provide for the common defense of all the States by using for each the power of all; to secure the blessings of liberty to ourselves and our posterity — those liberties which were so well understood at the time, that the Fathers thought it unnecessary to enumerate them in a Bill of Rights; to leave the States in full possession of all sovereign powers not ceded, including the right to prescribe the qualifications of voters, and of jurors, and also the right to maintain a State militia, and govern the same, except when it was constitutionally called forth in the service of the United States for one of the three purposes named; to leave the citizen of the State in complete possession of his immemorial rights, as understood by the Fathers, and as set

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forth in such State papers as the Great Charter, the Act of Habeas Corpus, the Petition of Rights, the Bill of Rights, and the Amendments to the United States Constitution adopted prior to the Civil War.

Whether an Act of Congress imposing compulsory military service upon citizens of a selected age would have been held constitutional prior to 1865, need not now be considered. We know that the States, alone, exercised that power to some extent during the Revolutionary War; and that the efforts of the Government in 1814 and 1833 to secure such an Act were defeated.

At the time the Fathers invested Congress with the power "to raise armies," the small Kingdom of Prussia was the only European state that had been accustomed to raise them by compulsion. The English system, since Feudalism and its Knight-service of 40 days a year, had consistently been voluntary. Crimping and kidnapping were the abuses of the system, but there was never a legalized conscription until the third year of the present war.

We earnestly submit to your Honor, that no decision made prior to 1865 would adjudicate the issues we raise in favor of these two complainants. The 13th, 14th, and 15th Amendments worked material changes in the pre-existing Constitutional system.

The negro and his civil status were the subject matter; but the words of the law could not measure

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the citizen's rights by the color of his skin. What was law for the black, became law for the white; and what was law for the natural person, became law for the artificial.

I call your Honor's special attention to the fact that the United States Courts have held the 14th Amendment to annul the 11th.

The Eleventh Amendment denies to the United States Courts jurisdiction over suits commenced or prosecuted against one of the United States by citizens of another State; and that Amendment was adopted to protect the sovereign States from being made defendants in United States Courts by private citizens of a State, or of a foreign country. It is well known that Chisholm's case against the State of Georgia was the provocation of that Amendment.

After the adoption of the 11th Amendment, it was universally respected by the United States Courts, during all the years preceding the Civil War, and during the entire period covered by that lamentable struggle.

But when the 14th Amendment was adopted, after the war, a different course was pursued.

That change in the Supreme Law created, for the first time, a citizenship of the Federal Government, as distinguished from State citizenship; and the States were forbidden by the Federal Government, *for the first time*, to make any law abridging the rights of these newly-made United States citizens.

No State was thereafter to be allowed to deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

How was it possible for the United States Courts to give effect to the 14th Amendment without ignoring the 11th? If the citizen-corporation of New York could not bring suit against the State of Georgia, claiming that the State had made a law violating the 14th Amendment, where would redress be sought? The long line of decisions in which the United States Courts have set aside or enjoined the enforcement of State laws, upon the ground that they were confiscatory, and therefore in violation of the 14th Amendment, necessarily rest upon the idea that the later Amendment prevails over its predecessor.

Now, with all the earnestness of my nature, I appeal to your Honor to say whether the 14th Amendment, so effective to safeguard property, does not equally protect life; and whether the 13th Amendment, being a part of the radical change made in the Constitutional system after the Civil War, does not override any preceding clause in the Supreme Law and all decisions made thereunder.

The vast combinations of wealth, incorporated for all manner of business enterprise, have taken refuge in the broad provisions of law, made particularly for the negro.

Not only the white man, but the corporations owned by the whites, can come into court and suc-

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cessfully plead against any form of servitude to which they are opposed. Can a corporation be made to serve the Government against its will? That very issue may be sprung within the next few weeks, and your Honor may have to pass on it.

I am not speaking of martial law, duly proclaimed; nor of military law embracing camps, trenches, and troops in actual service; I am speaking solely of the civilian, and the civil status; and my contention is, that the citizen can no more be lawfully forced into military service, than he can be drafted to mine coal, smelt metals, build post-roads, and dredge rivers and harbors.

And my contention further is, that while the enlisted man, legally a soldier, is a soldier for all purposes, and from the very nature of the employment may be sent anywhere and controlled absolutely by his officers, THE CIVILIAN, standing flat-footed on his rights under the Constitution, cannot be arbitrarily deprived of his liberty, cannot be sent out of the United States, cannot be compelled to undergo any form of servitude, and cannot be legally controlled in his personal movements, WHEN HE IS OUTSIDE OF THE TERRITORIAL JURISDICTION OF THIS REPUBLIC.

To say that Congress can forfeit the Constitutional rights of millions of citizens, and can authorize their despotic control in Europe, is abhorrent to every idea of civil liberty, and repugnant to every principle of sound law.

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The Act of May 18, 1917, together with other legislation constituting the General Army plan, has been officially construed by the President to mean, not only the incorporation of the State militia into the Regular Army — which we say is unconstitutional — but to mean, that citizens may be “assigned” to manual labor in fields, mines and factories.

The language of the President in his address to his fellow countrymen is, that “thousands, nay, hundreds of thousands of men, otherwise liable to military service, will of right and necessity be excused from that service, and assigned to the fundamental, sustaining work of the fields and factories and mines.”

Has Congress the power to authorize a system of industrial servitude? The law under discussion is held to be broad enough for that purpose, and the President apparently so understands it. What else could be meant when he speaks of citizens being “assigned” to manual labor? Who will do the assigning? Who will send a thousand black men to the fields, and a thousand white men to the mines? If they are unwilling to be assigned, and must be coerced, what becomes of the 13th Amendment?

The liberty of one is the liberty of all; in defending these two negroes, we defend everybody. If Congress can annihilate their civil status, and “automatically” transform them into soldiers, it can with equal legality transform them into peons and slaves. No Alexandrian sword can cut a cleavage between

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the prohibition against slavery and the prohibition against involuntary servitude. The bolt which smites one, smites the other; the curse of the Supreme Law is pronounced against both.

How, then, is Congress to raise armies? The conscript has never yet played any part in English history; and very little in ours. There are 4,000,000 volunteers fighting England's battles at this time; and nearly 1,000,000 Americans voluntarily enlisted in our Army. Who knows how many would volunteer, under conditions which convinced our people that such service was needed for the defense of the country?

There is no limit to the number of able-bodied men that the States may enroll in the militia, and the United States has ample constitutional power to appropriate every one of these men, provided the service is needed to repel invasion, suppress insurrection, or execute the laws of the Union.

Twelve million men will spring to arms, at the call of the Government, to defend their country. It is the idea of being sent into foreign lands to fight for something not understood, that agitates our people, deters enlistments, and spreads consternation.

Not a line of the Supreme Law indicates the purpose of the Fathers to authorize the use of the military for any other purposes than those stated in the Preamble, and in the body of the Constitution; and those provisions strictly limit the use of our troops to tranquillizing our own country, up-

holding our system of laws, and repelling any invader who ventures to attack our frontiers.

That question, however, is not before the Court. The only question here is the constitutionality of this Act of Congress. If Congress has undertaken to raise armies by a method which violates the Supreme Law, then Congress must try some other method. If the method hastily adopted by Congress destroys the guaranteed liberties of the citizen, then Congress must choose some other plan.

To raise armies is a legitimate power, most necessary to preserve the Union; but that power must not be abused to the destruction of our republican institutions. If the destruction of the Temple of our liberties is a condition precedent to raising armies, then it is a colossal instance of paying too much for the whistle. Liberties without armies are preferable to armies without liberties.

May it please your Honor, I beg leave to submit to your most thoughtful consideration these additional propositions:

(1) The New Acts of Congress emasculate the States, deprive them of powers necessary to preserve a republican form of Government, and make it impossible for the States to protect their citizens in the enjoyment of those rights guaranteed to them by the Constitutions of the States.

(2) The new laws usurp Federal control over the State militia, and render the sovereign State powerless, in case of any unforeseen and sudden riot,

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invasion, or other emergency which puts the State upon the defensive, to uphold its authority and defend its soil.

(3) The new Acts disintegrate the States, disorganizing and revolutionizing their internal affairs, penalizing freedom of speech and of press, and rendering ineffective the State's Constitutional guarantee of life, liberty, property, and pursuit of happiness. In other words, the Acts complained of amount to a repeal of the most important of the civil liberties set forth in every State Bill of Rights.

(4) They violate both the letter and the spirit of the organic act of the Union, totally subvert the scheme of divided and balanced sovereignty, reduce the States to the helplessness of subject provinces, and are therefore null and void.

(5) Section 6 of the Act (May 18, 1917) places under Presidential conscription every officer of the State. The new duties of the officials thus conscripted are left undefined. Those State officers must obey such orders as the President chooses to issue. In case the Governor of a State fails or refuses to do what the President tells him to do, the Governor becomes guilty of a misdemeanor. If he should be unable to give bond when arrested, he must go to jail. He may then continue to act as Governor the best he can, from the prison to which the President commits him. If found guilty at his trial he may be punished by a year's imprisonment; or if held to be a part of the military establishment

—and therefore subject to military law—he may be summarily court-martialed and incontinently shot. No other construction can be put upon Section 6, if it is admitted that the Governor is one of the officers of a State.

To every State officer the same section applies; and no matter how pressing might be the needs of the State for the diligent service of her officials, she is compelled to sacrifice the interests of the State to the demands of the President. In other words, the State government is paralyzed, and the various organs of State administration must cease to perform their functions, if the President exercises the enormous power conferred by this Act.

Such powers are not democratic or republican; they are imperial, belonging to systems where Divine Rights and One-man Power are supreme, and where the personal will of the sovereign is not limited by charter or kept in check by independent, incorruptible courts.

You may ransack your law-libraries, read every paper of Hamilton and Madison, scan every speech of Webster and John Quincy Adams, study every decision of John Marshall, Joseph Story, and Roger Taney, but you will search in vain for the germ of the revolutionary doctrine that Congress may, through the Executive, transform State Governors into Presidential satellites, lesser State officers into Federal officials, and suspend the sovereignty of the State by sending the entire State establishment

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to jail for non-performance of Federal duties suddenly thrust upon it by Congress.

If this kind of thing can be done, anything can be done. It comes dangerously near to abolishing the State's form of republican government, if it does not, in fact, DO THAT VERY THING. What is left of the State's form of republican government, when her entire establishment is placed under conscription by the Federal Government?

What could be a more ruinous blow at the separate, sovereign existence of the State, within its Constitutional orbit, than an Act of Congress which fuses all State establishments into one federal mass, and makes the whole mass criminal if it fails to obey such commands as the President may see fit to issue? It is almost a mockery to talk of the Constitution and the laws, and of our unprecedented mixed system of government, when such a revolutionary Act of Congress is being enforced.

Has any statesman in this Union ever contended that the President can be legally vested with authority to prescribe duties to any and all State officers? Has any court done so? Does the power to raise armies carry power to subjugate peaceful, loyal States? Cannot we raise armies without burying the Constitution? Must we build our military system in the cemetery where we have first entombed the States?

It has been many years since I appeared in any court — except where compelled to go in my own

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behalf — and had not expected ever to argue another case. But the vital and lasting results that depend upon the recent Acts of Congress, caused me to volunteer my services, and I am here, without fee or other reward, and with no other interest than that of a lover of liberty and of country. As well as possible, under the shadow and handicap of a terrible domestic affliction, I have done my duty by those who trusted me. The issue is with your Honor.

Let me conclude, in the words with which Mr. Hill ended the great argument already quoted:

“Sir, in disunion through the disintegration of the States I have never been able to see anything but anarchy with its endless horrors. In disunion through the destruction of the States I have never been able to see anything but rigid, hopeless despotism, with all its endless oppression. In disunion by any means, in any form, for any cause, I have never been able to see anything but blood, and waste, and ruin to all races and colors and conditions of men.

“But in the preservation of our Union of States, this confederate nation, I have never been able to see anything but a grandeur and a glory such as no people ever enjoyed. I pray God that every arm that shall be raised to destroy that Union may be withered before it can strike the blow.”

Judge Speer's Opinion

ALBERT JONES and John Story, imprisoned in Richmond County jail under commitment for unlawfully failing to register for military duty as required by the Act of Congress of May 18, 1917,

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known popularly as the selective draft law, have made application for writs of habeas corpus.

They allege that their imprisonment is unlawful. They charge that the enactment made to raise a national army is violative of the Constitution of the United States. It is insisted that the authority exercised by the United States under this legislation is void because the Act contravenes the Thirteenth Amendment. This provides that "Neither slavery nor involuntary servitude, except as punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

To agree to this contention we must conclude that a soldier is a slave. Nothing could be more abhorrent to the truth, nothing more degrading to that indispensable and gallant body of citizens trained in arms, to whose manhood, skill, and courage is and must be committed the task of maintaining the very existence of the Nation and all that its people hold dear. The Grand Army of the Republic, the Confederate Veterans, and the Sons of Veterans are not maintained to preserve the traditions of slavery. Nations do not pension slaves to commemorate their valor. They do not "give in charge their names to the sweet lyre," nor does —

"Sculpture in her turn
Give bond in stone and ever-during brass
To guard and to immortalize the trust."

The sole additional ground of the petition is that by the common law it was the right of petitioners to "remain within the realm," and that this right should now be held to relieve them from military service beyond the borders of the United States. The reply is that the common law — that is, the immemorial English law — cannot prevail as to the United States or its people against the explicit provisions of an Act of Congress. Nor has a court of the United States power to declare an Act of Congress invalid because it is inimical to the common law. The touchstone for such judicial power is the Constitution and nothing else.

It remains to be determined whether the Constitution has conferred authority on Congress to enact this law. Article 1, section 8, of the Constitution, empowers Congress "to raise and support armies." This power is plenary. It is not restricted in any manner. Congress may summon to its Army thus authorized every citizen of the United States. Since it may summon all, it may summon any.

Said the Supreme Court in the case of the United States v. Tarble (13 Wallace, 408):

"Among the powers assigned to the National Government is the power to raise and support armies. Its control over the subject is plenary and exclusive. It can determine without question from any State authority how the Army shall be raised, whether by voluntary enlistments or forced draft, the age at which the soldiers shall be received and the period for which they shall be taken, the compensation they shall be allowed, and the service to which they shall be assigned."

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It is urged that by this legislation Congress has taken over and in this way conscripted the National Guard. This, it is said, is the State militia. It is contended, under clause 14 of the article and section above quoted, that such militia can be used only to execute the laws of the Union, to suppress insurrection, and repel invasion. Since these petitioners are not members of the National Guard, in no event could their rights in this way be affected. But the National Army is not the militia. An army is a body of men whose business is war. (Burroughs vs. Peyton, 16 Gratt., Virginia, 475.) The militia is "a body of men composed of citizens occupied temporarily in the pursuits of civil life." (Idem.)

As we have seen, Congress in the exercise of the power to raise armies may summon to the colors every citizen. It follows that the States, even if they so desire, cannot defeat this power by enlisting such citizens in the State troops or National Guard. Were this possible, it would be also possible for the States to prevent altogether the raising of armies by Congress.

There remains to be considered the contention that Congress cannot employ the National Army to be created by virtue of this legislation in foreign lands or beyond the seas. If this is true, then indeed is our country impotent. Then must its people indeed suffer in their own homes, in their cities, and on their farms all the horrors of invasive war. Its military leaders must ignore the settled principle

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of their science, that the best defensive is the most vigorous offensive. The keen swords of its sons, instead of flashing over the guard of the enemy and piercing his vitals, must be held immovable, as if on an anvil, to be shattered by the reiterated blows of his hammer. Deprived of our aid in the field, successive defeats will visit and crush our allies. Their lands conquered, their navies taken, we must then in turn, solitary and alone, meet on our own soil the impact of victorious and barbarous legions whose laws do not forbid their service abroad but which inspire their fierce and veteran armies to deeds of conquest in every clime.

Were this contention maintainable, the misguided men who for their personal ease advance it might all too late discover their fatal error. They would discover it in the flaming homesteads, in the devastated fields, in murdered brethren, in outraged wives and daughters, in their lands, their factories, their merchandise, their stock, their all, coolly appropriated by the conqueror as his own; their institutions destroyed; homeless, landless, and beggars, to spend whatever interval of degraded life might remain to them in abject slavery to the conqueror.

But our organic law does not so shackle the gigantic energies of the great Republic. After the enumeration of the powers of Congress, among them, as we have seen, "the power to raise and support armies," in clause 17 of Article 1, section 8, it

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provides the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Here is the great reservoir of power to save the national existence.

It is said that there is no express power to send armies beyond the sea. True; but there is no *express* power to enact the criminal laws of the United States, none to convey the public domain, to build a transcontinental railroad, nor to construct the Isthmian Canal, nor to create the Interstate Commerce Commission, nor to declare the Monroe doctrine, nor to make the Louisiana Purchase, nor to buy Alaska, nor to take over Porto Rico and the Philippines. This has all been done under the great power to promote the general welfare, just as the selective army will be created under the law here assailed, "to provide for the common defense."

Beyond and above all is the inherent power of every nation, however organized, to utilize its every man and its every energy to defend its liberty and to defeat the migration to its soil of mighty nations of ferocious warriors, whose barbarous inhumanity for three years has surpassed all others since the death of Attila, the scourge of God.

The writs are denied.

Opinion of U. S. Supreme Court

WE are here concerned with some of the provisions of the Act of May 18, 1917 (Public No. 12, 65th Congress, c. 15. — Stat. —), entitled "An act to authorize the President to increase temporarily the military establishment of the United States." The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass upon and those which will throw light on their significance are briefly summarized.

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 5, 1916, c. 134, 39 Stat. 211) and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President, announcing the necessity for their service; and fifth, by providing for selecting from the body so

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called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and State officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a noncombatant character to be defined by the President.

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government

and regulation of the land and naval forces." Article 1, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article 1, § 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed State citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate State citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power, by the very terms of the Constitution being delegated, is supreme. Article 6. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States. Further, it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include

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the power to exact enforced military duty by the citizen. This, however, but challenges the existence of all power, for a governmental power which has no sanction to it, and which therefore can only be exercised provided the citizen consents to its exertion, is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so, because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need; that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, *Law of Nations*, book III, cc. 1 and 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force.¹ In England it

¹ In the argument of the government it is stated: "The Statesman's Yearbook for 1917 cites the following governments as enforce-

is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Blackstone, book I, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood

ing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Colombia, p. 790; Chili, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1191; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353." See also the recent Canadian conscription act, entitled, "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic, "De Locale Wetten en Volksraadsbesluiten der Zuid Afr. Republick," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb., 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBL, p. 593; Loi sur le recrutement de l'armée of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

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that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted whether at home or abroad. This is exemplified by the present English Service Act.¹

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed the brief of the government contains a list of Colonial Acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called. But it is indisputable that the States in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact, the duty of the citizen to

¹ Military Service Act, January 27, 1916, 5 and 6 George V, c. 104, p. 367, amended by the Military Service Act of May 25, 1916, 2d session 6 and 7 George V, c. 15, p. 33.

render military service and the power to compel him against his consent to do so, was expressly sanctioned by the Constitutions of at least nine of the States, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776:

“That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto.” Article 8 (Thorpe, *American Charters, Constitutions and Organic Laws*, vol. 5, pp. 3081, 3083).¹

While it is true that the States were sometimes slow in exerting the power in order to fill their quotas — a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the States to resort to drafts to fill their quotas² — that fact serves to demonstrate instead of to chal-

¹ See also Constitution of Vermont, 1777, c. 1, art. 9 (Thorpe, vol. 6, pp. 3737, 3740); New York, 1777, art. 40 (Id. vol. 5, p. 2367); Massachusetts Bill of Rights, 1780, art. 10 (Id. vol. 3, p. 1891); New Hampshire, 1784, pt. 1, Bill of rights, art. 12 (Id. vol. 4, p. 2455); Delaware, 1776, art. 9 (Id. vol. 1, pp. 563, 564); Maryland, 1776, art. 33 (Id. vol. 3, pp. 1686, 1696); Virginia, 1776, Militia (Id. vol. 7, p. 3817); Georgia, 1777, arts. 33, 35 (Id. vol. 2, pp. 777, 782).

² Journals of Congress, Ford's Ed., Library of Congress, vol. 7, pp. 262, 263; vol. 10, pp. 199, 200; vol. 13, p. 299. 7 Sparks, *Writings of Washington*, pp. 162, 167, 442, 444.

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lenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the States for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10.

[2] To argue that as the State authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army. Nor is this met by saying that it does not exclude the right of Congress to organize an army by voluntary enlistments, that is, by the consent of the citizens, for if the proposition be true, the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call because of State authority, the citizen had a right to obey the call and set aside State au-

thority if he pleased to do so. And a like conclusion demonstrates the want of foundation for the contention that although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited in some respects to services for which the militia it is assumed may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it and yet destroys the purpose for which the call is authorized — the raising of armies to be under the control of the United States.

The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

“The Congress shall have power: . . . To provide for calling forth the militia to execute the laws of the nation, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.” Article 1, § 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitu-

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tion was adopted and the remedy which it provided for the military situation with which it dealt. The right, on the one hand, of Congress under the Confederation to call on the States for forces and the duty, on the other, of the States to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress, all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the States on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting the power thus conferred in all its plenitude was not made at once obligatory, but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the

strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the States. It further conduced to the same result by delegating to Congress the right to call, on occasions which were specified, for the militia force, thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed when called for such special purposes although subjecting the militia when so called to the paramount authority of the United States. *Tarble's Case*, 13 Wall. 397, 408, 20 L. Ed. 597. But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for

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confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every State (Act of May 8, 1792, c. 33, 1 Stat. 271) which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the states according to their quota to be trained as directed by Congress and to be called by the President as need might require.¹ When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in

¹ Act of May 9, 1794, c. 27, 1 Stat. 367; Act of February 28, 1795, c. 36, 1 Stat. 424; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of March 3, 1803, c. 32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of March 30, 1808, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705.

numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border,¹ the government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no

¹ Upton, *Military Policy of the United States*, p. 99 et seq.

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draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the States in accordance with the previous acts of Congress. Proclamation of April 15, 1861, 12 Stat. 1258. That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. Act of July 22, 1861, c. 9, 12 Stat. 268. This was soon followed by another act increasing the force of the militia to be organized by the States for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it

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soon became manifest that more men were required. As a result the Act of March 3, 1863 (c. 75, 12 Stat. 731), was adopted entitled "An act for enrolling and calling out the national forces and for other purposes." By that act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of 20 and 45 was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July, 1863, of February and March, 1864, of July and December, 1864, producing a force of about a quarter of a million men.¹ It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks

¹ Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866.

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of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed, in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject, it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the States as trained by the States under the direction of Congress became known as the National Guard. Act of January 21, 1903, c. 196, 32 Stat. 775; National Defense Act of June 5, 1916, c. 134, 39 Stat. 211. And to make further preparation from among the great body of the citizens, an additional number to be determined by the President was directed to be organized and trained by the States as the National Guard Reserve. National Defense Act, *supra*.

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the

colonies before the Revolution, of the States under the Confederation and of the government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. *Kneedler v. Lane*, 45 Pa. 238. And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution, as effect follows cause, we briefly recur to events in another environment. The seceding States wrote into the Constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted not differing in principle from the one here in question was challenged, its validity was upheld, evidently after great consideration, by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North

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Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. *Burroughs v. Peyton*, 16 Grat. (Va.) 470; *Jeffers v. Fair*, 33 Ga. 347; *Daly and Fitzgerald v. Harris*, 33 Ga. Supp. 38, 54; *Barber v. Irwin*, 34 Ga. 27; *Parker v. Kaughman*, 34 Ga. 136; *Ex parte Coupland*, 26 Tex. 386; *Ex parte Hill*, 38 Ala. 429; *In re Emerson*, 39 Ala. 437; *In re Pille*, 39 Ala. 459; *Simmons v. Miller*, 40 Miss. 19; *Gatlin v. Walton*, 60 N. C. 333, 408.

In reviewing the subject we have hitherto considered it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that amendment for the purpose of pointing out, as has been frequently done in the past,¹ how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and, therefore, operating as it does upon all the powers conferred by the Constitution leaves no possible support for the contentions made if their want of merit was otherwise not so clearly made manifest.

¹ *Slaughter House Cases*, 16 Wall. 36, 72-74, 94, 95, 112, 113, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. Ed. 588; *Boyd v. Thayer*, 143 U. S. 135, 140, 12 Sup. Ct. 375, 36 L. Ed. 103; *McPherson v. Blacker*, 146 U. S. 1, 37, 13 Sup. Ct. 3, 36 L. Ed. 869.

It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of federal power to State officials because of some of its administrative features is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Intermountain Rate Cases*, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; *First National Bank v. Union Trust Co.*, 244 U. S. 416, 37 Sup. Ct. 734, 61 L. Ed. 1233. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. *Buttfield v. Stranahan*, 192 U. S. 470, 497, 24 Sup. Ct. 349, 48 L. Ed. 525; *West v. Hitchcock*, 205 U. S. 80, 27 Sup. Ct. 423, 51 L. Ed. 718; *Ocean Navigation Co. v. Stranahan*, 214 U. S. 320, 338-340, 29 Sup. Ct. 671, 53 L. Ed. 1013; *Zakonaite v. Wolf*, 226 U. S. 272, 275, 33 Sup. Ct. 31, 57 L. Ed. 218. And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof re-

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pugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement

Affirmed.

When the highest court in the land had thus placed its stamp of judicial approval upon the validity of the Act, criticisms of its terms and provisions began to vanish everywhere, and soon there settled in the great heart of America a single sentiment and determination, destined to linger there in the fadeless splendors of eternal truth and justice so long as our liberties were in danger and civilization's future touched with peril.

George Morrow Mayo felt the inspiration that had come to a reunited people when he wrote the following beautiful lines:

“Here’s to the blue of the wind-swept North,
When we meet on the fields of France;
May the spirit of Grant be with you all
As the sons of the North advance.

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“And here’s to the gray of the sun-kissed South,
When we meet on the fields of France;
May the spirit of Lee be with you all
As the sons of the South advance.

“And here’s to the blue and gray as one
When we meet on the fields of France;
May the spirit of God be with us all
As the sons of the Flag advance.”

Aye, indeed, the spirit of Grant, the spirit of Lee and the spirit of God were with them “over there.”

The powers of autocracy, fighting to the very last against all that was best in the world’s civilization, eventually crumbled and virtually surrendered to the mighty hosts of democracy composed of immortal armies of Gentile and Jew, Catholic and Protestant, soldiers from the four quarters of the earth and of various creeds, races and nations, but with one dominant thought — justice to the weak as well as the strong and the triumph of law everywhere.

At the eleventh hour of the eleventh day of the eleventh month of 1918 the booming of the great guns ceased. The end had come. The blood of heroes had not been spent in vain. Imperial thrones were falling to their doom, and once more on history’s page it was written that Right had conquered Wrong.

The soldiers of the United States — from North, South, East and West — had carried the Stars and Stripes to a foreign land, and through its glorious folds the dawn was seen.

That flag, which has never known defeat nor sought dishonorable victory, comes back once more, pure and stainless still, the emblem of justice as well as power.

The Trial of Robert Emmet

ROBERT EMMET was born in Dublin, Ireland, in 1778. From his youth he seemed imbued with a restless and revolutionary spirit and early became identified with the United Irishmen, who were then contemplating an outbreak in Ireland with the expectation of receiving assistance from France.

Emmet went to Paris in October, 1802, and talked with Napoleon. Upon his return to Ireland he was informed that seventeen counties were ready to take up arms in rebellion against the government.

Preparations for such an event went forward rapidly. Simultaneous attacks were to be made on the castle and the artillery barracks at Island bridge while numbers of insurgents were to march on the capitol.

The day for the concerted attack came, and Emmet, dressed in a uniform of green and white, placed himself at the head of eighty men and marched toward the castle.

Others joined in the march but there was no order or discipline, due partly to the fact that Emmet's associates were men without ability. Signs of intoxication were also evident and the maneuvers soon

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became nothing more than a street brawl. Lord Kilwarden and his nephew were dragged from their carriage and killed. All of Emmet's plans were rapidly miscarrying; confusion was everywhere. Perceiving the hopelessness of the situation Emmet escaped and his followers were soon dispersed.

Emmet was later captured and his trial for treason took place at Dublin on September 19, 1803. William Conyngham Plunkett made the argument against him at the trial. Emmet was represented by Leonard MacNally, and, to add to his other misfortunes, was betrayed, it seems, by his own lawyer.

Emmet was convicted and, upon being asked if he had any reason to urge why the sentence of death should not be pronounced against him, delivered that wonderful speech which must have thrilled his hearers with the intensest interest even as it has thrilled the generations of the after years.

Speech of William C. Plunkett

MY LORDS AND GENTLEMEN OF THE JURY:

IF this were an ordinary case, and if the object of the prosecution did not include some more momentous interests than the mere question of the guilt or innocence of the unfortunate gentleman who stands a prisoner at the bar, I should have followed the example of his counsel and should have declined

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making any observation upon the evidence. But, gentlemen, I think that this case is one of infinite importance, indeed. It is a case important like all others of this kind, by involving the life of a fellow subject; but it is tenfold more important because from the evidence which has been given in the progress of it the system of this conspiracy against the laws and Constitution of the country has been developed in all its branches; and in observing upon the conduct of the prisoner at the bar, and in bringing home the evidence of his guilt, I am bringing home guilt to a person, who I say is the center, the lifeblood and soul of this atrocious conspiracy.

Gentlemen, I shall not detain you by detailing the particulars of the proof. You see the prisoner at the bar returning from foreign countries some time before hostilities were on the point of breaking out between these countries and France. At first avowing himself, not disguising or concealing himself; he was then under no necessity of doing so, but when hostilities commenced and when it was not improbable that foreign invasion might co-operate with domestic treason, you see him throwing off the name by which he was previously known, and distinguishing himself under new appellations and characters. You see him, in the month of March or April, going to an obscure lodging at Harold's Cross, assuming the name of Hewitt, and concealing himself there. Why? If he were upon any private enterprise, if for any other purpose than that which

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is imputed to him by the indictment, has he called a single witness to explain it? No; but after remaining six weeks or two months in this concealment, when matters began to ripen a little more, when the house was hired in Thomas Street, which became the depot and magazine of military preparation, he then thinks it necessary to assume another character and another place of abode, accommodated to a more enlarged sphere of action. He abandons his lodging, he pays a fine of sixty-one guineas for a house in Butterfield Lane, again disguising by another assumed name, that of Ellis. Has he called any person to account for this, or to excuse by argument, or even by assertion, this conduct? Why, if not for a wrong purpose, should he take this place for his habitation under a feigned name?

But you find his plans of treason becoming more mature. He is there associated with two persons. One of them has been ascertained by the evidence to have been a person originally following the occupation of a bricklayer, but he seems to have thought proper to desert the humble walk in which he was originally placed and to become a framer of constitutions and a subverter of empires.

With these associates he remains at Butterfield Lane, occasionally leaving it and returning again; whether he was superintending the works which were going forward, or whatever other employment engaged him, you will determine. Be it what it may; if it were not for the purpose of treason and

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rebellion, he has not thought proper by evidence to explain it.

So matters continued until some short time before the fatal night of the twenty-third of July. Matters became somewhat hastened by an event which took place about a week before the breaking out of the insurrection. A house in Patrick Street, in which a quantity of powder had been collected for the purpose of the rebellion, exploded. An alarm was spread by this accident; the conspirators found that if they delayed their schemes and waited for foreign co-operation, they would be detected and defeated, and, therefore, it became necessary to hasten to immediate action.

What is the consequence? From that time the prisoner is not seen in his old habitation; he moves into town, and becomes an inmate and constant inhabitant of this depot. These facts which I am stating are not collected from inference from his disguise, his concealment, or the assumption of a feigned name, or the other concomitant circumstances, but are proved by the positive testimony of three witnesses, all of whom positively swear to his identity, tallying exactly with each other as to his person, the dress he wore, the functions he exercised; and every one of whom had a full opportunity of seeing and knowing him.

You see him at Butterfield Lane under the assumed name of Ellis; you see him carrying the same name into the depot, not wishing to avow his own

until achievement of the enterprise would crown it with some additional éclat. You hear the kind of implements which were prepared, their account of the command assumed by the prisoner, living an entire week in the depot, animating his workmen, and hastening them to the conclusion of their business. When the hour of action arrived, you see him dressed in military array, putting himself at the head of the troops who had been shut up with him in this asylum, and advancing with his party, armed for the capture of the castle and the destruction of his fellow citizens.

Gentlemen, with regard to the mass of accumulated evidence forming irrefragable proof of the guilt of the prisoner I conceive no man, capable of putting together two ideas, can have a doubt. Why, then, do I address you, or why should I trespass any longer upon your time and your attention? Because, as I have already mentioned, I feel this to be a case of great national importance; and, because I am prosecuting a man, in whose veins the very lifeblood of this conspiracy flowed. What does it avow itself to be? A plan not to correct the excesses or reform the abuses of the Government of the country; not to remove any specks of imperfection which might have grown upon the surface of the Constitution, or to restrain the overgrown power of the Crown, or to restore any privilege of Parliament, or to throw any new security around the liberty of the subject; no, but it plainly and boldly

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avows itself to be a plan to separate Great Britain from Ireland, uproot the monarchy, and establish "a free and independent republic in Ireland" in its place.

To sever the connection between Great Britain and Ireland! Gentlemen, I should feel it a waste of words and of public time were I, addressing you or any person within the limits of my voice, to talk of the frantic desperation of the plan of any man who speculates upon the dissolution of that empire, whose glory and whose happiness depend upon its indissoluble connection. But were it practicable to sever that connection, to untie the links which bind us to the British Constitution, and to turn us adrift upon the turbulent ocean of revolution, who could answer for the existence of this country as an independent power for a year? God and nature have made the two countries essential to each other; let them cling to each other to the end of time, and their united affection and loyalty will be proof against the machinations of the world.

But how was this to be done? By establishing "a free and independent republic!" High-sounding name! I would ask whether this man who used it understood what he meant. I will not ask what may be its benefits, for I know its evils. There is no magic in the name. We have heard of "free and independent republics" and have since seen the most abject slavery that ever groaned under iron despotism growing out of them.

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Formerly, gentlemen of the jury, we have seen revolutions effected by some great call of the people, ripe for change and unfitted by their habits for ancient forms; but here from the obscurity of concealment and by the voice of that pygmy authority, self-created and fearing to show itself but in arms under cover of the night, we are called upon to surrender a Constitution which has lasted for a thousand years. Had any body of the people come forward stating any grievance, or announcing any demand for a change? No, but while the country is peaceful, enjoying the blessings of the Constitution, growing rich and happy under it, a few desperate, obscure, contemptible adventurers in the trade of revolution form a scheme against the constituted authorities of the land, a scheme to overthrow by force and violence an ancient and venerable Constitution, and to plunge a whole people into the horrors of civil war!

If the wisest head that ever lived had framed the wisest system of laws which human ingenuity could devise, if he were satisfied that the system were exactly fitted to the disposition of the people for whom he intended it, and that a great proportion of that people were anxious for its adoption, yet give me leave to say that under all these circumstances of fitness and disposition, a well-judging mind and a humane heart would pause a while and stop upon the brink of his purpose, before he would hazard the peace of the country by resorting to force for

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the establishment of his system. But here, in the frenzy of distempered ambition, the author of the proclamation conceives the project of "a free and independent republic," and at once flings it down and tells every man in the community, rich or poor, loyal or disloyal, that he must adopt it at the peril of being considered an enemy to the country, and of suffering the pains and penalties attendant there-upon.

Gentlemen, they have not stated what particular grievance or oppression is complained of, but they have traveled back into the history of six centuries, they have raked up the ashes of former cruelties and rebellions, and upon the memory of them they call upon the good people of this country to embark into similar troubles. They forget to tell the people whom they address that they have been enjoying the equal benefit of laws by which the property, the person, and the constitutional rights and privileges of every man are abundantly protected. Ours is a country of laws. Justice rules and they have not pointed out a single instance of oppression.

Give me leave to ask any man who may have suffered himself to be deluded by those enemies of the law, what there is to prevent the exercise of honest industry, and enjoying the produce of it? Does any man presume to invade him in the enjoyment of his property? If he does, is not the punishment of the law brought down upon him? What is it that any rational friend to freedom could expect

that the people of this country are not fully and amply in the possession of? And, therefore, when those idle stories are told of six hundred years of oppression and of rebellions prevailing, when this country was in a state of ignorance and barbarism, and which have long since passed away, they are utterly destitute of a fact to rest upon; they are a fraud upon feeling, and are the pretext of the factious and ambitious, working upon credulity and ignorance.

Gentlemen, why do I state these facts? Is it to show that the Government need not be vigilant, or that our gallant countrymen should relax in their exertions? By no means; but to convince the miserable victims, who have been misled by those phantoms of revolutionary delusion, that they ought to lose no time in abandoning a cause which cannot protect itself, and exposes them to destruction, and to adhere to the peaceful and secure habits of honest industry. If they knew it, they have no reason to repine at their lot; Providence is not so unkind to them in casting them in that humble walk in which they are placed. Let them obey the law and cultivate religion and worship their God in their own way. They may prosecute their labor in peace and tranquillity; they need not envy the higher ranks of life, but may look with pity upon that vicious despot who watches with the sleepless eye of disquieting ambition, and sits a wretched usurper trembling upon the throne of the Bourbons.

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I do not wish, however, to awaken any remorse, except such as may be salutary to himself and the country, in the mind of the prisoner; but when he reflects that he has stooped from the honorable situation in which his birth, talents and his education placed him, to debauch the minds of the lower orders of ignorant men with the phantoms of liberty and equality, he must feel that it was an unworthy use of his talents; he should feel remorse for the consequences which ensued, grievous to humanity and virtue, and should endeavor to make all the atonement he can by employing the little time which remains for him in endeavoring to undeceive them.

Liberty and equality are dangerous names to make use of; if properly understood, they mean enjoyment of personal freedom under the equal protection of the laws; and a genuine love of liberty inculcates an affection for our friends, our king, and our country; a reverence for their lives, an anxiety for their safety; a feeling which advances from private to public life, until it expands and swells into the more dignified name of philanthropy and philosophy. But in the cant of modern philosophy, these affections which form the ennobling distinctions of man's nature are all thrown aside and the vices of his character are made the instrument of moral good.

To a man whose principles are thus poisoned and whose judgment is thus perverted, the most flagitious crimes lose their proper names; robbery and murder become moral good. He is taught not to startle at

putting to death a fellow-creature, if it be presented as a mode of contributing to the good of all. In pursuit of these phantoms and chimeras of the brain, they abolish feelings and instincts, which God and nature have planted in our hearts for the good of mankind. Thus, by the printed plan for the establishment of liberty and a free republic, murder is prohibited and proscribed; and yet you heard how this caution against excesses was followed up by the recital of every grievance that ever existed, and which could excite every bad feeling of the heart, the most vengeful cruelty and insatiate thirst for blood.

Gentlemen, I am anxious to suppose that the mind of the prisoner recoiled at the scenes of murder which he witnessed, and I mention one circumstance with satisfaction; it appears that he saved the life of Farrell; and may the recollection of that one good action cheer him in his last moments! But though he may not have planned individual murders, that is no excuse to justify his embarking in treason, which must be followed by every species of crimes. Let loose the rabble of the country from the salutary restraints of the law, and who can take upon him to limit their barbarities? Who can say he will disturb the peace of the world and rule it when wildest? Let loose the winds of heaven, and what power less than Omnipotence can control them? So it is with the rabble; let them loose and who can restrain them? What claim, then, can the prisoner

have upon the compassion of a jury, because in the general destruction which his schemes necessarily produced he did not meditate individual murder? In the short space of fifteen minutes what a scene of blood and horror was exhibited! I trust that the blood which was shed in the streets of Dublin upon that night, and has since been shed upon the scaffold, and which may hereafter be shed, will not be visited upon the head of the prisoner.

It is not for me to say what are the limits of the mercy of God, or what a sincere repentance of those crimes may effect; but I do say that if this unfortunate young gentleman retains any of the seeds of humanity in his heart, or possesses any of those qualities which a virtuous education in a liberal seminary must have planted in his bosom, he will make an atonement to his God and his country, by employing whatever time remains to him in warning his deluded countrymen from persevering in their schemes. Much blood has been shed, and he, perhaps, would have been immolated by his followers if he had succeeded. They are a bloodthirsty crew, incapable of listening to the voice of reason and equally incapable of obtaining rational freedom, if it were wanting in this country, as they are of enjoying it. They imbrue their hands in the most sacred blood of the country, and yet they call upon God to prosper their cause, as if it were just! It is atrocious, wicked, abominable, and I most devoutly invoke Almighty God to confound and overwhelm it.

Emmet's Defense of Himself

MY LORDS:

I AM asked what I have to say as to why sentence of death should not be pronounced on me, according to law.

I have nothing to say that will alter your determination; nor that it will become me to say, with any view to the mitigation of that sentence which you are to pronounce, and which I must abide by.

I might say much, though, why my reputation should be rescued from the load of false accusation and calumny which has been cast upon it and which you have labored to destroy. My character is more dear to me than life.

I do not imagine that, seated where you are, your mind can be so free as to receive any impression from what I am going to say. I have no hopes that I can anchor my character in the breast of a court constituted as this one is. I only wish, and that is the utmost that I expect, that your lordships may suffer it to float down your memories untainted by the foul breath of prejudice, until it finds some more hospitable harbor to shelter it from the storms by which it is buffeted.

Were I only to suffer death, after being adjudged guilty by your tribunal, I should bow in silence, and meet the fate that awaits me without a murmur; but the sentence of the law, which delivers my body

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to the executioner, will, through the ministry of the law, labor in its own vindication to consign my character to obloquy; for there must be guilt somewhere; whether in the sentence of the court, or in the catastrophe, time must determine.

A man in my situation has not only to encounter the difficulties of fortune, and the force of power over minds which it has corrupted or subjugated, but the difficulties of established prejudice. The man dies, but his memory lives. That mine may not perish, that it may live in the respect of my countrymen, I seize upon this opportunity to vindicate myself from some of the charges alleged against me.

When my spirit shall be wafted to a more friendly port; when my shade shall have joined the bands of those martyred heroes who have shed their blood on the scaffold and in the field, in the defense of their country and of virtue, this is my hope: I wish that my memory and my name may animate those who survive me, while I look down with complacency on the destruction of that perfidious government which upholds its domination by blasphemy of the Most High; which displays its power over man, as over the beasts of the forests; which sets man upon his brother, and lifts his hand, in the name of God, against the throat of his fellow who believes or doubts a little more or a little less than the government standard — a government which is steeled to barbarity by the cries of the orphans and the tears of the widows it has made.

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I appeal to the immaculate God — I swear by the throne of Heaven, before which I must shortly appear — by the blood of the murdered patriots who have gone before me — that my conduct has been, through all this peril, and through all my purposes, governed only by the convictions which I have uttered, and by no other view than that of the emancipation of my country from the inhuman oppression under which it has so long and too patiently travelled; and I confidently hope that, wild and chimerical as it may appear, there is still union and strength in Ireland to accomplish this noblest of enterprises. Of this I speak with the confidence of intimate knowledge, and with the consolation that appertains to that confidence.

Think not, my lords, I say this for the petty gratification of giving you a transitory uneasiness. A man who never yet raised his voice to assert a lie will not hazard his character with posterity by asserting a falsehood on a subject so important to his country, and on an occasion like this. Yes, my lords, a man who does not wish to have his epitaph written until his country is liberated will not leave a weapon in the power of envy, or a pretense to impeach the probity which he means to preserve, even in the grave to which tyranny consigns him.

Again, I say, what I have spoken was not intended for your lordships, whose situation I commiserate rather than envy; my expressions were for my countrymen. If there is a true Irishman present,

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let my last words cheer him in the hour of his affliction.

[At this point Lord Norbury interrupted Mr. Emmet and said that he was not sitting there to hear treason. Mr. Emmet continued:]

I have always understood it to be the duty of a judge, when a prisoner has been convicted, to pronounce the sentence of the law. I have also understood that judges sometimes think it their duty to hear with patience and to speak with humanity; to exhort the victim of the laws, and to offer with benignity their opinions of the motives by which he was actuated in the crime of which he was adjudged guilty. That a judge has thought it his duty so to have done, I have no doubt; but where is the boasted freedom of your institutions, the vaunted impartiality, clemency, and mildness of your courts of justice, if an unfortunate prisoner, whom your policy, and not justice, is about to deliver into the hands of the executioner, is not suffered to explain his motives sincerely and truly, and to vindicate the principles by which he was actuated?

My lords, it may be a part of the system of angry justice to bow a man's mind by humiliation to the purposed ignominy of the scaffold; but worse be the shame of such foul and unfounded imputations as have been laid against me in this court. You, my lord, are a judge; I am the supposed culprit. I am a man; you are a man also. By a revolution

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of power we might change places, though we never could change characters. If I stand at the bar of this court and dare not vindicate my character, what a farce is your justice! If I stand at this bar and dare not vindicate my character how dare you calumniate it? Does the sentence of death, which your unhallowed policy inflicts on my body, condemn my tongue to silence and my reputation to reproach? Your executioner may abridge the period of my existence; but while I exist, I shall not forbear to vindicate my character and motives from your aspersions; and, as a man, to whom a good name is dearer than life, I will make the last use of that life in doing justice to that reputation which is to live after me, and which is the only legacy I can leave to those I honor and love, and for whom I am proud to perish.

As men, my lords, we must appear on the great day at one common tribunal; and it will then remain for the Searcher of All Hearts to show a collective universe who was engaged in the most virtuous actions, or swayed by the purest motives — my country's oppressors, or —

[Mr. Emmet was here told by the court to listen to the sentence of the law but he spoke on:]

My lords, will a dying man be denied the legal privilege of exculpating himself in the eyes of the community from an undeserved reproach, thrown upon him during his trial, by charging him with ambition, and attempting to cast away for a paltry

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consideration the liberties of his country? Why did your lordships insult me? Or rather, why insult justice, in demanding of me why sentence of death should not be pronounced against me?

I know, my lords, that form prescribes that you should ask the question. The form also presents the right of answering. This, no doubt, may be dispensed with, and so might the whole ceremony of the trial, since sentence was already pronounced at the Castle before the jury were empaneled. Your lordships are but the priests of the oracle, and I insist on the whole of the forms.

I am charged with being an emissary of France. An emissary of France! And for what end? It is alleged that I wished to sell the independence of my country. Was this the object of my ambition? And is this the mode by which a tribunal of justice reconciles contradiction? No; I am no emissary, and my ambition was to hold a place among the deliverers of my country, not in power nor in profit, but in the glory of the achievement.

Sell my country's independence to France? For what? A change of masters? No, for ambition. Oh, my country! Could personal ambition influence me? Had it been the soul of my actions, could I not, by my education and fortune, by the rank and consideration of my family, have placed myself amongst the proudest of your oppressors? My country was my idol! To it I sacrificed every endearing sentiment; and for it I now give myself.

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O God! No, my lords; I acted as an Irishman, determined on delivering my country from the yoke of a foreign and unrelenting tyranny, and the more galling yoke of a domestic faction, which is its joint partner and perpetrator in the patricide. It was the wish of my heart to extricate my country from this doubly riveted despotism and to place her independence beyond the reach of any earthly power.

Connection with France was, indeed, intended, but only as far as mutual interest would sanction or require. Were the French to assume any authority inconsistent with the purest independence it would be the signal for their destruction. We sought their aid — and we sought it as we had assurance we should obtain it — as auxiliaries in war, and allies in peace. Were the French to come as invaders or enemies, uninvited by the wishes of the people, I should oppose them to the utmost of my strength.

Yes! my countrymen, I should advise you to meet them upon the beach with a sword in one hand, and a torch in the other. I would meet them with all the destructive fury of war. I would animate my countrymen to immolate them in their boats, before they had contaminated our soil. If they succeeded in landing, and if forced to retire before superior discipline, I would dispute every inch of ground, burn every blade of grass, and the last entrenchment of liberty should be my grave. What I could not do myself, if I should fall, I should leave as a last charge to my countrymen to accomplish; because

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I should feel conscious that life is no more unprofitable than death when a foreign nation holds my country in subjection.

I looked, it is true, for the assistance of France; but I wished to prove to France and to the world that Irishmen deserved to be assisted; that they were indignant at slavery, and ready to assert the independence and liberty of their country. I wished to procure for my country the guarantee which Washington procured for America; to procure an aid which, by its example, would be as important as its valor; the aid of a people gallant and pregnant with science and experience. They would come to us as strangers, and leave us as friends, after sharing in our perils and helping us in elevating our destiny.

My objects were not to receive new taskmasters, but to expel old tyrants. It was for these ends I sought aid from France; and France, even as an enemy, could not be more implacable than the enemy already in the bosom of my country.

I have been charged with that importance in the emancipation of my country as to be considered the keystone of the combination of Irishmen; or as your lordship expressed it, "the life and blood of the conspiracy." You do me honor overmuch; you have given to the subaltern all the credit of a superior. There are men engaged in this conspiracy who are not only superior to me, but even to your own conceptions of yourself, my lord; men before the splendor of whose genius and virtues I should

bow with respectful deference, and who would think themselves disgraced by shaking your blood-stained hand.

Shall you tell me, my lord, on the passage to the scaffold, which that tyranny (of which you are only the intermediary executioner) has erected for my murder, that I am accountable for all the blood that has been and will be shed in this struggle of the oppressed against the oppressor — shall you tell me this, and must I be so very a slave as not to repel it? I do not fear to approach the Omnipotent Judge to answer for the conduct of my whole life; and am I to be appalled by a mere remnant of mortality here? If it were possible to collect all the innocent blood that you have shed in your unhallowed ministry in one great reservoir, your lordship might swim in it.

Let no man dare, when I am dead, to charge me with dishonor; let no man attaint my memory, by believing that I could have engaged in any cause but that of my country's liberty and independence; or that I could have become the pliant minion of power, in the oppression and misery of my country.

The proclamation of the provisional government speaks for our views; no inference can be tortured from it to countenance barbarity or debasement at home, or subjection, humiliation, or treachery from abroad. I would not have submitted to a foreign oppressor, for the same reason that I would resist the foreign and domestic oppressor. In the dignity

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of freedom, I would have fought upon the threshold of my country, and its enemy should enter only by passing over my lifeless corpse. And am I, who lived but for my country, and who have subjected myself to the dangers of the jealous and watchful oppressor, and the bondage of the grave, only to give my countrymen their rights, and my country her independence — am I to be loaded with calumny, and not suffered to resent it? No; God forbid!

[Lord Norbury again interrupted Mr. Emmet and told him that such a speech as he was making was unworthy of one with his education, and a disgrace not only to himself but to his family, and especially to his father, Dr. Emmet, who, if he were alive, would not countenance such sentiments.

To this Mr. Emmet replied as follows:]

If the spirits of the illustrious dead participate in the concerns and cares of those who were dear to them in this transitory life, oh, ever dear and venerated shade of my departed father! look down with scrutiny upon the conduct of your suffering son, and see if I have, even for a moment, deviated from those principles of morality and patriotism which it was your care to instill into my youthful mind, and for which I now offer up my life.

My lords, you are impatient for the sacrifice. The blood which you seek is not congealed by the artificial terrors which surround your victim — it circulates warmly and unruffled through the channels which God created for noble purposes, but which

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you are now bent to destroy for purposes so grievous that they cry to heaven.

Be patient, my lords! I have but a few more words to say — I am going to my cold and silent grave — my lamp of life is nearly extinguished — my race is run — the grave opens to receive me, and I sink into its bosom.

I have but one request to ask at my departure from this world: it is — the charity of its silence. Let no man write my epitaph; for, as no man who knows my motives dares now vindicate them, let not prejudice nor ignorance asperse them. Let them and me rest in obscurity and peace, and my tomb remain uninscribed, and my memory in oblivion, until other times and other men can do justice to my character. When my country takes her place among the nations of the earth, then, and not till then, let my epitaph be written. I have done.

One day later, Sept. 20, 1803, Emmet was hanged. He was at this time but twenty-five years of age.

Without doubt Emmet's motives were pure and his personal courage unquestioned. It was a burning zeal and enthusiasm untempered by judgment and discretion, that wrought such a tragedy in his young life, although giving him a name to be honored and loved in succeeding ages.

Emmet probably could have escaped from Ireland before his arrest had he not lingered too long near the home of his betrothed, Sarah Curran, daughter of the famous orator and lawyer, John Philpot Curran.

Thinking of Sarah Curran, Washington Irving afterwards wrote, "The Broken Heart."

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Miss Curran was sent to Sicily with the hope that such a visit would join hands with Time in helping to assuage her grief. It was then that Thomas Moore, who had been a schoolfellow of Emmet, gave to the world these lines:

She is far from the land where her young hero sleeps
And lovers around her are sighing;
But coldly she turns from their gaze, and weeps,
For her heart in his grave is lying.

She sings the wild song of her dear native plains,
Every note which he loved awaking —
Ah! little they think, who delight in her strains,
How the heart of the minstrel is breaking!

He had lived for his love — for his country he died,
They were all that to life had entwined him —
Nor soon shall the tears of his country be dried,
Nor long will his love stay behind him!

Oh! make her a grave where the sunbeams rest,
When they promise a glorious morrow;
They'll shine o'er her sleep, like a smile from the west,
From her own loved island of sorrow!

The Favre-Monvoisin Case

IN the Court of Common Pleas of the County of New York there was tried at New York City, in October, 1873, the case of Theodore Favre *versus* Maxime N. Monvoisin, it being a suit for damages in the sum of twenty thousand dollars based upon the alleged seduction of the plaintiff's wife by the defendant.

The following argument was delivered at the trial by Henry L. Clinton, counsel for the plaintiff, from which eloquent presentation may be clearly gathered a correct idea as to the salient facts of this notable case.

It may be said in passing that Mr. Clinton, in his lifetime, was engaged as counsel in a very large number of important trials, among them the celebrated Tweed case, and was universally recognized as one of the ablest and most brilliant members of the bar of New York City.

Henry L. Clinton's Address to the Jury

GENTLEMEN OF THE JURY:

THREE and thirty years ago, in their native France, the destinies of Theodore Favre and Victoria Paten were united by the most sacred of

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earthly ties. He was twelve years her senior. His nature was frank, his heart open, his devotion generous, his affection pure, and when they started together on the journey of life, her devotion to him knew no bounds. His every wish was the law of her existence. To contribute to his happiness, to lighten his cares, to diminish his anxieties, to be in all things a faithful wife, she strove with a zeal born of virtue.

Not only then, but as time rolled on, and the child-wife became the mother of children; when the New World opened its prospects upon them and an ocean no longer rolled between them; when an increasing family brought increased cares; when youth from her had forever departed; when from him middle age had vanished into the past, and he felt that the evening of life would soon be upon him; at all times, under all circumstances, whether prosperity lighted his pathway or adversity chill and dark befell him, he ever found his comfort, his solace, his consolation in the society and companionship of his wife, the queen of his household, the idol of his heart, the divinity of his affections.

Their lot was cast in the middle walks of life. Luxury and wealth they knew not. His great treasure, as he ever fondly believed, was in his wife. As he beheld her year after year struggling on with him, never weary in her efforts faithfully to discharge her duties to her household, her devotion to his interests and her affection for him increasing

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with advancing age, the thought ever in his mind was:

She is mine own,
And I as rich, in having such a jewel,
As twenty seas, if all their sands were pearl,
The water nectar, and the rocks pure gold.

Gentlemen, such were the relations of my client from his wedding day to the time this defendant became his co-partner in business and a member of his household.

Not long afterwards the defendant was overtaken with an affliction which you would have thought sufficient to soften the heart of any man. His wife fell a victim to intemperance, a vice which has desolated so many households and to such depths did she fall that he caused her incarceration in one of the penal institutions of our State. He was left with a little child five years of age upon his hands. My client and his wife, in the kindness of their hearts, took charge of that little child. She mingled with their children and their children's children, and became one of their family. They shared a common table.

At the head of this household was one who at the early age of fifteen was wedded to the plaintiff. She was a person remarkably youthful in appearance, and undoubtedly possessed of great attractions. At a very early age her own children were married, and her grandchildren were springing up about her.

Gentlemen, she who was wife at fifteen, mother at sixteen, grandmother at thirty-three, with her

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children and children's children around her, and forming a most interesting family group; ten years only the senior of this defendant, his junior in appearance, she is the one whom, under such circumstances, he selects as the victim of his lechery. You would have thought that the holy associations clustering around that household would serve as a wall of adamant between my client's wife and this defendant, so far as any impropriety was concerned.

But not so! The intimacy of the families threw the defendant, to a large extent, into the society of the plaintiff's family, and it was necessary for Mrs. Favre at night to go to the defendant's premises, which adjoined those of the plaintiff, to put that little child to bed, to hush her to sleep, and probably to hear her prayers; and the defendant seized such occasions to undermine her affection for her husband, in order that he might, in time, secure her as the victim of his lechery.

When did this guilt begin? We know not. That good matron up to this time had been as pure and virtuous as any woman living, so far as we know and believe. You have seen the confidence my client reposed in his wife up to the time of the fearful disclosure of her guilt. He thought nothing of the intimacies which grew out of the family relations of himself and his partner. He did not object to the ministration to this little child, the only offspring of this defendant.

Now, gentlemen, the defendant, from the time he

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was taken into partnership with the plaintiff, must have cast his lecherous eyes upon this woman, because, a woman like Mrs. Favre, who has grown to the years she has attained, surrounded by her children and grandchildren, does not fall at once. It must have been by insidious and long-continued approaches that this defendant finally succeeded in capturing the affections of such a one. At first, undoubtedly, their intercourse was guarded and cautious.

The counsel asks you if the parties would have been as open and shameless as the testimony shows them to have been if the wife had been pure up to that time. But remember that it is human nature, after an intercourse of that kind has progressed for months, if not for years, and the parties have not been detected, that they should grow bold.

You know that this is the course of these matters; that it is the course of vice of every kind. Take the public officer who has embezzled the public money. At first he watches the countenances of all around him, to see if suspicion is written upon them. The next time he perpetrates a similar offense, and is not detected, he is less cautious. And so on, until finally, from a long course of practice, he becomes more and more bold, until from his reckless carelessness, from his overweening stupidity, he is discovered.

I remember a case in this city some years ago, of a defalcation in one of our banks. The receiving teller for a long time had been embezzling the funds

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of the bank. He was very cautious; he would not leave town year after year. No sickness would prevent his going to his place of business, because he knew that if his assistant once looked at the books and footed them up he would discover the defalcation. The error consisted not in wrongly putting down any man's account but in *forced-in* footings. That error might have been discovered at any time.

Finally he became so bold—he was engaged in speculations in Wall Street, sometimes ahead, but oftener behind—that he thought he had watched and guarded his crime long enough, and on one occasion he left earlier than usual. His assistant thought he would add up the figures. He did so, and instantly discovered a defalcation reaching from thirty to fifty thousand dollars. Yes, gentlemen, one gets inured to vice and crime, and finally becomes so careless that detection follows. But for that fact detection often would not ensue.

The first time the evidence proves the existence of this illicit intercourse is no further back than June, 1871. That is proved by one of his daughters. I shall not trouble you with the sickening details. The daughter stated, under the solemnity of her oath, the circumstances under which she discovered her mother and the defendant on that occasion. She saw them near the window. She saw the defendant creep away and the mother readjust her dress.

The counsel wishes to have you believe that she is

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mistaken, and that her sister is also mistaken. Gentlemen, there can be no mistake. This little girl, who feels the obligations of an oath, who has honesty and integrity and the simplicity of childhood written upon her countenance, gave her evidence as truthfully and faithfully as ever testimony fell from human lips. You witnessed her manner and that of her sister. Either she and her sister and several other witnesses have committed wilful, deliberate perjury, or this defendant is guilty of that which is charged against him. Mistaken? She described her mother and Monvoisin in the very act. What does the counsel mean by saying that she is mistaken? You remember she states that upon discovering the parties they hurried away. She told the circumstances under which she discovered them. Could there be more clear, positive and direct testimony given in any case?

You have also the evidence of the married daughter, who saw the guilty couple on a different occasion. The counsel has said that he does not believe in knot-hole testimony. That is not exactly the description of this evidence. There is no reason to suppose that that daughter (Mrs. Zendulka), when she at first saw her mother go into Monvoisin's apartments, drew from that circumstance any unfavorable inference. Her mother was in the habit of going there to attend to his child. When she saw her go in, it was natural that she should wait for her to come out, so that she might join her and converse with

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her upon the usual domestic topics; but when she waited a considerable time and saw that her mother remained; when, to her horror, she observed that Mr. Monvoisin actually undressed before her mother, got into bed, and blew out the light, why, gentlemen, an impression was made which, while life lasts, can never be effaced from her memory. Mistaken about that! Why must this and the other daughter be the victims of the vituperation of the learned counsel? Mrs. Zendulka, having been brought up, as she believed, by a virtuous and honest mother, having children herself to whom she had set a virtuous and honest example, what was she to do when she saw this conduct on the part of her own mother? Not knowing what to do, she made no disclosure to the plaintiff until the period of time to which I shall presently advert.

Think of such a spectacle, gentlemen! These children were from their infancy taught to respect that mother, never for a moment suspecting her of evil, and when they saw that she whom they regarded as the embodiment of womanly perfection, to whom they were bound by such ties of affection, was guilty of such deeds, they did their utmost to conceal their mother's wickedness. I will not say whether it was their duty at once to tell their father. God forbid that any other daughters should ever be placed in such a dilemma, where in order to tell the truth to their father they must expose the hideous moral iniquities of their mother.

But these daughters did not expose their mother's conduct. They kept their mother's shame hidden. They from their earliest infancy had looked up to her with love and affection, and when the ideal of "mother" which had been instilled into them, in which they had believed from their cradle to that hour, vanished in the darkness of crime and infamy; when, instead of a pure and virtuous mother they saw before them an adulteress, those wretched children knew not what to do. The gushing tenderness of their nature for the mother overcame them, and they concealed her moral deformity until concealment was no longer possible.

Now, gentlemen, this defendant is guilty or he is not guilty. The counsel wishes you to believe that he is not guilty of illicit intercourse with Mrs. Favre because he comes upon the stand and swears that he is innocent. The naked issue is presented to you. You must either believe this defendant has sworn falsely (I will not stop to discuss that ugly word "perjury" at this moment; he has sworn to a deliberate falsehood, and the law calls that perjury) or else the two or three daughters of this plaintiff, and Mrs. Healey, and the plaintiff himself have all committed wanton perjury. You must impute perjury either to this defendant or to five or six innocent witnesses.

My learned friend and I view this matter differently. Since the statute was passed which in criminal cases permits the parties to testify in their own

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behalf every criminal goes upon the stand and swears that he is innocent. There is not, as far as my observation extends, an exception. The case may be proven on the part of the prosecution as strongly as ever human testimony can establish any case, and yet the defendant will go upon the stand and swear that the evidence given against him is false. What is to be done in a case like that? My learned friend himself filled the state prison with convicts when he was a public prosecutor by convincing juries that under precisely those circumstances they ought not to believe a defendant; and if they did not believe him, they morally convicted him of perjury.

In addition, what other testimony have you? The testimony of Mr. Favre. Now I ask you, gentlemen, whether Mr. Favre deserved the vituperation which was heaped upon him by the learned counsel? He said things in regards to Mr. Favre from which I know the kindness of his own heart will recoil, and were those words now read to him I think he would repudiate them before you retire to your room to deliberate on this case. He told you that Mr. Favre had none of those fine sensibilities which would induce a jury to attempt the vindication of his wrongs. He painted him as a man utterly bereft of moral sensibility. Now you saw Mr. Favre upon the stand. You had an opportunity of seeing him examined and cross-examined, and if ever there was a witness who was candid, frank — who told his wrongs with the simplicity

of truth itself — that witness was Mr. Favre, the plaintiff in this cause.

Wherein has he done wrong? You heard his story in relation to the discovery of the guilt of his wife. Up to that moment suspicion had not crossed his mind. He had lived with that good woman thirty-one years. She had borne him eleven children. His grandchildren were growing up around him.

On that occasion the defendant had absented himself during the evening. He and the defendant did not spend it together, as was their habit. About eleven or twelve o'clock Mr. Favre, who had spent the evening with his family, stated to his wife that the hour for retiring had arrived. She made an excuse to remain a little longer, to finish a dress upon which she was sewing. No suspicion arose from this circumstance.

Some time after he had undressed and gone to bed, he knocked on the floor. Their youngest child required her attention. He received no response. He knocked again and again, and finally his fears were aroused that some accident might have occurred. He hurried downstairs, and went out in the yard. He saw that the defendant's apartments were closed; the light was out. Under these circumstances he observed his wife emerge from the defendant's room.

Just think of that scene! This father, who had lived with his good wife so long, sees the moral evidence of her guilt, which falls like a thunderbolt

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upon him. His future is gone. He is an old man, over sixty years of age. He knows not what to do. His is the voice of nature. His is the voice of an honest man, who has toiled for forty or forty-five years at his business. His is the voice of a husband and a father, who has loved and honored his wife, and brought up his family in the principles of honesty and virtue, and then for the first time sees in that wife, not the virtuous mother of so many children, but an adulteress. Suddenly he says, "What! I have found you out. I will not live under the same roof where you are. You must go. I will not touch contamination nor defilement. I cannot." He has not time to stop and think how the poor woman will gain support or what will become of her after she has gone. He says, "Go! I will not remain under the same roof with you!"

During that night, as the daughter tells you, he paces his room; he descends to the floor below; he returns; he wanders up and down. The dreadful load is upon him. He is overborne with shame. Disgraced and humiliated in his own household, he cannot bear to think of the morrow, and the day after, when he must look his fellow men in the face.

The wretched, fallen woman rushed downstairs. I have no doubt she was horror-stricken at the discovery of her guilt. Her daughters, who had so often nestled in her arms, whom she had brought up so tenderly, seeing this dreadful blow fall upon her, hide her away and shelter her; they put her in

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another room so that their father will not know but that she in the darkness of night has fled, a homeless wanderer upon the face of the earth. They even practice a little deception towards their father, and do not inform him that she is there. The miserable woman sits up all that long, dreadful night.

O God! What a night was that to this unhappy family; the father upstairs under the circumstances I have described; the mother downstairs with her wretched children around her, those children knowing her guilt — one of them, if not both, having discovered her in the very act! And yet the kindness of their nature overpowers them. They see, instead of the adulteress, the mother. They cling to her.

Where is this defendant? He knows all; he sees all; he hears this outcry, this charge; he sees the misery he has brought upon this family. The eldest daughter, in the agony of her heart, cries out to him, "Monvoisin, if this is not true why don't you rush to the defense of my mother? Why don't you deny it? Why do you see her charged with these infamous, wicked acts, and yet not spring to her help?"

But no; this man remains in his house and locks the door. It was well that he did lock his door, for he had every reason to believe that if Mr. Favre in his rage should seize him, he would send him to his grave unprepared for that eternity upon which we must all so soon enter.

The next day was Sunday — and what a Sunday

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for that family! Mrs. Favre, this wretched woman, early that morning, before daybreak, goes a wanderer from the home in which she had lived, and which she — as her husband had hitherto believed — adorned for so many years; she goes she knows not whither.

The defendant that morning, knowing that Mrs. Favre is driven away, meets her daughter. I think the occasion to which I allude was as late as ten or eleven o'clock. That daughter, in her distress and agony, says — what? "Oh! what will my poor mother do? Father has expelled her from the house; she has no means of livelihood; if we, her children, can save from our earnings enough to take care of her, to save her from infamy, we will do it. What will my poor mother do?"

What does Monvoisin say? "She is in this difficulty on my account; I will furnish money." Why, gentlemen, was not that conscious guilt, that could thus address these daughters who were mourning the loss of their mother? It was a loss worse than death, for their hearts would not have so bled had they, in the course of nature, followed that mother to an honored grave. When they, in their very agony, are thus crying out, this defendant, knowing his guilt says: "This is my affair. I will see to it."

What next? Mrs. Favre goes to this woman, Mrs. Bonneau. The next day Mrs. Bonneau returns to New York. Mrs. Favre, like every other adulteress, denied her guilt. She told Mrs. Bonneau

that she was innocent. Did you ever know an instance of a woman for the first time caught in the act of adultery who to her friends and acquaintances did not deny the fact? That disposition to deny such a fact is implanted in the very nature of every woman. To the very last she will deny that she is guilty of even an impure thought. That is true of the worst of women, and how much more true must it be of one who had never fallen, except in her intercourse with a single individual?

Many years ago, in this city, it was my fortune together with the late David Graham, to be associated with the prosecution in a very remarkable case on the criminal side of the court. The complainant was a woman, who accused her clergyman of impropriety. She charged him with an attempt at rape. The circumstances as related to us were extraordinary. We had no reason to doubt the story of this woman; we had no reason to doubt that her character was pure, that she was free from any criminality, and had been so during her whole life. She had a husband, whom we believed to be a very reputable man, who was engaged in a most respectable business. We told her that, if, during her whole life, she had ever committed any offense of the kind to which I advert; if there had ever been any scandal in connection with her; if her relations with the opposite sex, under any circumstances, in the days of her youth, or at any time, had been otherwise than in accordance with strict propriety, no matter though the

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clergyman were guilty, she ought by no means to press that case; that she ought to avoid the scandal. We told her that as sure as there was a God in heaven the publicity of the trial would bring out her antecedents from any part of the country if she had been guilty of anything of the kind.

She assured us that from her cradle to that hour she had been as pure as the driven snow, that the breath of scandal had never reached her. We went to trial, and the result was that the publicity of the proceedings brought to light the fact that she had been an abandoned woman from her early years, that she had committed bigamy several times, and that at the very time we were sympathizing with her excellent, worthy, honest, high-minded husband, he was no husband at all, but she was living in open adultery with him; he had another wife, and they were both liable to indictment for bigamy. I mention this case to show how strongly the disposition is implanted in a woman's breast to deny her guilt. Mrs. Favre denied her guilt. That was natural.

Mrs. Bonneau on Monday came to the city and obtruded herself in the plaintiff's family. The plaintiff had known her as a countrywoman. There had not been much intercourse with her and his family. One of the daughters says they visited her two or three times in the last ten or twelve years. You saw her as she appeared upon the stand. When she went to that house on that occasion she was an intruder. That was a house of mourning and

desolation. She went there and took the part of Mrs. Favre. I will not blame her, for Mrs. Favre had told her that she was innocent. Mrs. Bonneau tells you that this little girl — the plaintiff's daughter — said they were trying to induce her to tell that which was not true.

Now, gentlemen, nothing whatever of that kind occurred, and I attribute the assertion to the imagination of Mrs. Bonneau. I do not say that she told an intentional falsehood, but I do say that that statement is not true. It may be, at this distance of time, that she has got her numerous conversations with this defendant mixed up with her recollection of that interview on Monday at the house of Mr. Favre. It is a significant fact in this connection that Mrs. Bonneau's home, at this day, is the home of the defendant and his child.

On Wednesday these parties, Mrs. Favre and the defendant, got together. Where? At Mrs. Bourke's. Mrs. Favre goes to Mrs. Bourke's, and Mr. Monvoisin conveniently happens to be there. The counsel told you that Mr. and Mrs. Bourke would be called to explain that fact, but they have not made their appearance. Up to this time the defendant had never gone to Mrs. Bonneau's to remain all night. He knew that Mrs. Favre was there, and he went there Wednesday evening, and saw her. He made arrangements for that to be his home; and he took his daughter up and left her where Mrs. Favre was. He went up there as often as he could; for several weeks he went every few days.

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The next we hear of their proceedings is that arrangements are made that they shall throw off all disguise. After Mrs. Favre had left her home under the circumstances detailed to you, the arrangement was made with defendant that they should go to East Thirty-sixth Street, and live in open adultery. This is proved, gentlemen of the jury, not by the plaintiff and his family. Why, if you were to strike from the case the evidence of every member of this family and his own evidence, the proof of this adultery would be clear and overwhelming. The defendant went there; he admits that he went there.

There is no way by which he can engage in lecherous indulgence with this woman except to secure her dependence upon him in his own apartments. He, therefore, went to Mrs. Healey, who had rooms to let, went to her, and did what? He engaged rooms for his family, consisting of three. He then took his furniture from his own house and moved it to this place in East Thirty-sixth Street.

He had his own house, and could live there, rent free. He could have his little daughter there, and could have any woman whom he might engage as housekeeper, under suitable circumstances, to take care of her. But no; that poor man gives up his own house, takes his furniture, goes to East Thirty-sixth Street, and there engages rooms for his family, consisting of whom? Consisting of himself, as he told Mrs. Healey, his second wife, and his little girl.

It is true he swore that Mrs. Favre slept not in the

room with him, but in the other room on the lounge. Yet from the circumstances it is clear that they lived together in open and notorious adultery. Mrs. Healey, who saw them there frequently, considered them man and wife, and knew nothing to the contrary.

I asked him if he agreed to give Mrs. Favre any money for her services? Not at all. He supported and took care of her. What excuse did he give for not living in his own place in Tenth Avenue? He said he was afraid Mr. Favre would kill him, because Mr. Favre had charged him with improper conduct with Mrs. Favre. If that were true, if that were the reason, would he go to this place in East Thirty-sixth Street, introduce Mrs. Favre as his second wife, and let her pass by his name, she purchasing whatever was necessary for their joint use, and he paying for everything, she performing all the duties of a wife, taking care of his child and the rooms, and he supporting her?

There is but one construction, of course, to be put upon such conduct. Mr. Monvoisin admitted this himself. The nature of their intimacy is proved by Monvoisin, Mrs. Healey, and by the man who kept the store at which she made the purchases. I would like to know how we could prove that any man was living with a woman in open adultery, except in this way. There is no other mode of proving it. They had no servants. Had they employed a servant there, we could have called her to prove that they

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occupied the same bed. There was no person to call except Mrs. Favre, and the law adjudges her to be an incompetent witness in this case. The only other witness whom we could have called is that little girl, seven years of age, too young to understand the nature of an oath; but for other reasons, which will readily suggest themselves to you, we would not call her. No witness can speak, therefore, as to what transpired in that bedroom except Monvoisin himself. And he admitted enough to prove clearly and satisfactorily that he was living there in open adultery with the plaintiff's wife. He told you that she tried to get work elsewhere. Where is the proof? To whom did she apply? Where is the witness who will substantiate that statement? Had she applied to any person in New York for work would not that person have been forthcoming to prove the fact?

When the defendant said he did not live in Tenth Avenue because he feared the violence of the plaintiff, he testified, I believe, to what was false; because had he feared that the plaintiff would take his life on account of the wrong he had done him, he must have known that the plaintiff would have been far more apt to wreak his vengeance upon him when he saw that his wife lived in open adultery with her seducer. How long did that continue? Up to the 15th of November.

You remember the declaration brought on cross-examination by my learned friend on the other side

when one of the plaintiff's daughters testified as to the conversation with her father. The counsel asked if she did not hear her father say that he was going to bring suit. The answer was that she did at the time her mother and the defendant were living together in East Thirty-sixth Street; and that the father, in speaking of that fact to his own children, said: "What a shame! They are living in open adultery! I will have Monvoisin arrested. I will bring suit."

Gentlemen, the father delayed week after week, disinclined to bring this subject before the public, unwilling to lay bare his own shame. This kind-hearted Christian man knew not what to do. Had Monvoisin, on the night of the 7th of October, 1871, been in his presence — had the door not been locked — had they been together in the yard of the plaintiff's house when he made the first discovery of his wife's guilt — his reason might have been dethroned and his passion so aroused that he might have imbrued his hands in the blood of his fellow man. He might have had the guilt of murder resting upon his soul. But, fortunately, Sunday with its hallowed associations intervened, and there was time for the broken-hearted father to think and reflect.

The plaintiff could not bear the sight of that woman. So far as I am aware, from that hour to this not a word has ever been exchanged between them. He could not endure the sound of her voice; and yet, gentlemen, on the other hand he had this

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to consider; she was the mother of his children who themselves had children. Her name had been untarnished up to the time of her guilt with the defendant. Undoubtedly he could not bear that she should go forth to the world either as the mistress of this wretch or that she should become the tenant of some brothel, where she would die in shame and ignominy. Such considerations restrained him.

He waited week after week. He heard that his wife was at Tuckahoe with Mrs. Bonneau. He heard that Monvoisin had followed her there. He banished Monvoisin from his presence. He broke up the partnership. They were pursuing a lucrative business. The partnership had been agreeable as well as profitable. The counsel told you that my client was engaged in a conspiracy to drive Monvoisin out of the partnership and rob him of the fortune invested in the business; and yet but a little while ago the same counsel told you that this poor man had nothing whatever; that he was without means, and therefore you should not find a large verdict against him.

Mr. Favre heard of his wife being at Tuckahoe. As I said, he heard Monvoisin was also at Tuckahoe. That was a terrible blow to him. He thought that when she rushed from the city and went to a humble acquaintance who kept a boarding-house in the country; that when she escaped from the very island on which we live, she ought to be free from the contamination of this man. But no; he follows her

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there. Week after week rolls round, and Monvoisin, who had never before spent a night at Tuckahoe, makes arrangements with Mrs. Bonneau that her place shall be the home of himself and his family.

Yet, after a while, when Mrs. Bonneau is tired of keeping this woman, or rather, gentlemen, when it becomes inconvenient for this man to visit her at Tuckahoe as often as he would like, he begins to think that he must have her in New York; that she is too far from him. He can only visit her at Tuckahoe once or twice a week.

When the plaintiff's daughter went to see if her mother was there, and found not only her mother, but Monvoisin, he said to her, "What is your father going to do about it?" He never once said he was innocent. When these children of Favre's talked with him, or rather he with them, on the subject, why was it that he never once told them that he was innocent of the charge? He waits until his lawyer can say it for him. He does not say it. The father heard that his wife and the defendant were at Tuckahoe together. The daughter came back and reported the fact. Judge of that father's condition of mind at that time when he heard that this man was still pursuing his wife. But worse was in store. The father took no legal proceedings; he did not then invoke the law.

What next? The next he hears is that they are living together in open and shameless adultery at 328 East Thirty-sixth Street. The father hears of

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it, and says, "This is too much. I cannot stand it; I won't stand it. I will commence suit. I will have him arrested." There they remained, in open and flagrant adultery, up to the 15th of November.

When this father was driven to madness by his wrongs, and there was no other way by which they could be redressed than by this suit, he commenced it. He had no other remedy. Our laws are defective in that respect. In many States of this Union the crime of which this defendant is proven guilty is punished by a long term of imprisonment; but at the present day in this State there is no criminal punishment and the only punishment is that which we ask you to administer. What was the plaintiff to do? He had but one of two courses open to him, either to go to 328 East Thirth-sixth Street armed with a pistol or a dagger and kill the adulterer in the very act, or to resort to the law for redress.

Christian man as he was, he resorted to the law. He made his complaint, and this man was arrested and taken from the very arms of the adulteress to jail. There he remained for four months. So determined was this man not to release his grasp upon plaintiff's wife that his intercourse with her could not be stopped unless the walls of a prison separated them. Then for the first time the defendant found that this adulterous intercourse was too troublesome. He found before this that his partner had expelled him from his business; that the partnership was broken and ended forever. That did

not stop him, because he could get into other business. But when he found that he was incarcerated in jail, and that intercourse between himself and the partner of his iniquity was no longer practicable, he began to reflect.

During these four months he had time to reflect, and, thank God, Mrs. Favre also had time to reflect. Her children had time to reflect, and they rushed to her rescue. They showed her the charity which children should show on such an occasion. They clung to that mother; they furnished her support, and their influence was so great with her that she finally broke off all connection with this wretch. She went back to her children, and they have housed and sheltered her from that day to this.

It is true the younger daughters received money from their father, and the others from their husbands; they took from their husbands' earnings and their own earnings what they could spare, and they all supported that mother in her distress. Notwithstanding the father's sense of his great wrongs, he has not the heart to forbid his children doing this, because but for their help her only resource would be to go down to the grave from some brothel, or to die an ignominious death in the almshouse. I have no doubt that, with the exception of her criminality with this defendant, she has always been a pure woman.

Because the plaintiff did not exhibit greater harshness towards his wife he has been the victim of the counsel's vituperation. He said that because the

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plaintiff did not forbid his children sheltering their mother under the circumstances, his conduct proved that he regarded her a fit companion for his little daughter. No, she is not a fit companion, and yet she is her mother. The children have no choice as to who shall sustain to them the relation of mother. The ties of nature are strong, and in the kindness of their hearts they believe that their mother has repented of her crime in sackcloth and ashes.

Gentlemen, we have proved that this defendant is guilty beyond all question, and that the atrocity of his conduct is so great that a jury should punish him to the utmost extent of their power.

I ask you by your verdict to mark your sense of the atrocity of his conduct. The counsel, for the purpose of inducing you to render a small verdict, has represented that his client is poor. Whether he is poor or not you have no evidence whatever.

The counsel has represented to you that you should not mete out the same punishment you would if these parties were in a higher sphere of life. I cannot subscribe to that doctrine. Men of wealth, men in the higher positions in society, have other means of enjoyment. They can go to their clubs. They can go to their literary associations, to their lectures, to their amusements; they have many and varied associations by which, in the event of a domestic calamity, they may, to a certain extent, drive it from their minds; but with persons in the middle walks of life their homes are their all.

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This plaintiff has little of comfort left. What is his future? To what can he look forward? The counsel says he has brought no action for a divorce. You see he is an old man. He has his children and grandchildren growing up about him, and under no circumstances would he ever marry again and bring another woman into his household as a mother to those children. The only object of a divorce would be to permit him to marry again.

Gentlemen, I ask you to render a verdict for the highest amount mentioned in our complaint, for the purpose of showing that, if there be no other law than that we invoke, if there be no other mode of redress in a flagrant case, a jury will mete out punishment to the utmost extent of their power.

Gentlemen, you cannot but feel respect and compassion for my unfortunate client. Unless you would intensify the agony which pierced his soul, which caused his intellect to totter to its very foundation — which well-nigh laid his mind in ruins — when, with the blinding power of the lightning's flash, the truth burst upon him, and he beheld his family altar in ruins — his wife polluted, defiled — himself the husband of one who had played the harlot — his children and his children's children compelled to gaze on one whom they had loved and revered as the honored head of their household — aye! compelled to behold in her a shameless, hideous adulteress; unless you would add to the desolation of such a scene, you will render a verdict which will brand this

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seducer, this adulterer, as a moral leper, whose presence in the family circle is to be shunned as worse than pestilence and death.

Aye, gentlemen, the scenes — the midnight scenes — on the 7th of October, 1871! would to God that they might fade from my client's memory! that they would cease to overload his breaking heart! that they would no longer continue a dark cloud enshrouding his future with the blackness of despair.

Gentlemen, not you, nor any upon whom a similar calamity never descended, can appreciate the depth of my client's feelings when first overwhelmed with the knowledge of his own dishonor, his wife's infamy, the humiliation, the degradation in store for his children and his children's children.

Ah, gentlemen, because you are human, because your hearts pulsate in unison with right, because you are the willing instruments of the law to do justice, because you know and feel the fond and endearing associations which cluster around the human heart and entwine themselves in our very existence at the mention of the sacred names, daughter, wife, mother, you cannot, will not, render an unrighteous verdict which will suffer the defendant — this lecherous brute — to go forth from this courtroom unwhipped of justice — unscathed by an offended and outraged law.

Oh, no! You will not deprive my client of the consolation which may yet give him heart — buoy him up with courage — to struggle and toil on for the

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support of loved ones dependent upon him during the brief remnant of his days — the consolation of knowing that a jury of his peers have done all in their power to redress his wrongs and protect the family circle from defilement and infamy.

After deliberating thirty minutes the jury agreed on a verdict for \$10,000 in favor of the plaintiff.

The Trial of Alex Johnson

ON October 2, 1912, at Waco, Texas, began the trial of Alex Johnson charged with having unlawfully taken the life of A. P. Duncan.

Duncan was manager of the Waco Machinery and Supply Co. and Johnson was an employee, a traveling salesman. The two men had a dispute as to the terms of a contract; words passed, and Johnson shot and killed Duncan. The State said it was murder; the defendant claimed that he shot to save his life.

At the trial, which took place before Hon. Richard I. Monroe, Judge of the 54th District Court, the defense was represented by Judge J. N. Gallagher, Hon. S. E. Stratton and the firm of Williams and Williams.

For the State appeared Judge Sam R. Scott and Hon. Pat M. Neff, the latter being prosecuting attorney of the county.

At the instance of the counsel for the defense the speech of Mr. Neff was stenographically reported by the official court reporter; for which act of the prisoner's counsel we venture all readers of this volume will be grateful.

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Speech of Mr. Neff for the State

MAY, IT PLEASE THE COURT AND GENTLEMEN OF
THE JURY:

FOR more than four hours you have listened with becoming patience to the able arguments of the distinguished attorneys for the defendant. If this were a contest of legal achievements, or of that ability to make the worse the better reason seem, it would be presumptuous in me to array myself in answer to these who have so faithfully followed the fate and fortunes of their client. Rich as they are in legal learning, and ripe as they are in legal experience, they have marshalled their rare genius and their wondrous powers before this jury, not so much to reveal, as to conceal, the truth.

Merely as a David, wearing no armor of excellence, but clad only in the glorious garments of a righteous cause, I come to meet these Goliaths of the bar. Notwithstanding the many unkind things said and the still more unkind things suggested, I come with no apologies on my lips and with no blush of shame on my cheek, to represent before this jury the cause of the State. It is, however, at an hour like this, that I appreciate more than at any other time the fact that I live in a land where in the administration of justice we have a jury system. Man in his wisdom has never been able to devise a better plan in dealing with the life or liberty of the individual than to



PAT M. NEFF

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try him before a jury of his peers. This jury system had its origin in the dawn of Anglo-Saxon civilization and, surviving the storms and revolutions that swept the English soil, has become imbedded in our form of government and constitutes today one of the fixed and essential parts of our jurisprudence.

Blackstone, the great teacher at whose shrine we all must bow, declared the jury system to be the palladium of liberty and the glory of the law. As long as the jury box is filled with brave, honest and courageous citizens and by their verdicts kept pure, so long will the pristine power of the people in the administration of the law remain inviolate and undisturbed.

Gideon, who in days of old stepped from the threshing floor and called his countrymen to arms along the darkened valley of Jezreel to fight the battles of his God, championed a cause not more divine nor sublime than that engaged in by the day laborer who lays down his implements of toil and the millionaire who leaves his money in the mint, when they together, in obedience to the law, sit side by side in the jury box to fight the battles of truth. The armed warrior, whose weapon is the sword, is not the only soldier who fights for the Republic. Brave, honest and courageous citizens sitting in the silence of the jury room can win a nobler victory for their people than did Scipio when on the field of Cannae he slipped three bushels of golden rings from the fingers of Rome's slaughtered knights. The conflict for the

perpetuity of republican institutions has been transferred from the tented field to the legislative halls and the jury box. In one the laws are made and in the other they are maintained.

The selection of a jury in a case like this is not an easy task. My experience and observation have taught me that we have in this country many different kinds of jurors. We have the juror who is honest and conscientious, but who has not the moral courage to perform a heroic act in the jury box. He is the backboneless juror. He is an object of pity rather than censure. In his heart he knows the right, but when the hour comes for him to proclaim the truth he falters, then faints and falls at the feet of the foe. On the field of carnage, amid the tramp of troops and the drumbeats of battle, he might gladly march down the dusty road to die for his country, but he has not that high type of courageous manhood that enables him to live for it in fighting the battles of peace.

Then we have that juror who is not in sympathy with the enforcement of any law unless that law meets with his approval. His oath to try a case according to the law, not as he thinks the law ought to be, is to him but empty words. This juror, who is one of that class of self-constituted great men, pops his heels together and hurls thunderbolts at Jupiter, declaring with considerable gusto that he knows what laws are good and what laws ought to be enforced, without any instructions from any judge, or any

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limitations by any court. And because we have such jurors in this country is the reason why I asked whether you could and would try this case according to the law, as the court gave the law to you, or according to your individual ideas as to what the law ought to be.

You may be surprised to know it, but we have in this country jurors who are always in sympathy with the defendant. I have heard such jurors state in this very courtroom that they would not send a man to the penitentiary for any crime committed. I only have to say that this class of citizens ought not to be permitted to live in this civilized land of ours; they ought not to be permitted to inherit their father's estate through the court. They ought not to be permitted to collect a promissory note by means of the law. Perhaps, though, they are not to be blamed, as the leopard cannot change his spots.

Then we have, gentlemen, a class of citizens in this country — and I blush to mention them in this magnificent presence — who with padded feet slip into the jury box for improper purposes. When I questioned you, gentlemen, on your voir dire examination, as to your qualifications for jury service in this case, I gave each of you an opportunity to say as to whether or not you had any opinion in this case, and so we do in the trial of all cases.

It is all right for a citizen to have his individual views of the guilt or innocence of any man, but it is infamous for him, holding an opinion of guilt or inno-

cence, to assume for improper purposes jury service. There is no expression in the vocabulary of human speech that can properly describe and depict the dark thought and the dangerous deeds of such a citizen. The hired assassins of Russia, the official murderers of New York and the midnight riders of Kentucky are gentlemen as compared with one who under the guise of a good citizen slips with a tiger's tread into the jury box to perpetrate a fraud upon the law of the land. Such a juror is like the siren of old who courted and caressed her lover with one hand while with the other she mixed for him a deadly drug. O Janus, thou ancient god, turn both thy faces from out thy temple door, and let them burn with shame as thou beholdest such a juror with more two-facedness than ever dwelt with thee in thy abode on high Olympus!

Most of our jurors are brave, honest and courageous citizens, but with this objectionable material scattered throughout the land that always makes its appearance on the trial of an extraordinary case like this, the selection of a jury is not an easy task. It is not hard to select ten of the twelve, but it is difficult to select eleven of the twelve, and almost impossible to select twelve of the jury panel, each of whom measures up to the proper standard for jury service.

When the Saviour of Man, with all His wisdom and divine intuition, made an effort to select a jury of twelve to witness the evidence of His divinity and proclaim their verdict to the world, He found

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at the last hour that He had a Peter to deny the truth and a Judas to betray the cause. When George Washington selected his loyal lieutenants to fight the battles of the Revolution, he found in the darkest hour of the young Republic that he had in his official family a Benedict Arnold to prove a traitor and surrender the army. So, in the trial of an important case, with all our care and prudence, we often discover in our midst at the last hour a Peter to deny the truth, a Judas to betray the cause, and an Arnold to forget his country.

I want to say to you today that no man ever received a thrill of pleasure or a pulsation of satisfaction by betraying any position of trust or confidence. The only pleasure that comes from filling a trust of honor and responsibility such as you hold today comes from unswerving fidelity to truth and unyielding devotion to duty. When Peter discovered that he had betrayed a trust he poured out his heart in grief, and when Judas realized what he had done he threw down his thirty pieces of silver, fled from the sight of man and hanged himself. Benedict Arnold, whose military achievements at Quebec and Ticonderoga fill a bright page in history, in an unguarded moment betrayed the trust he owed his country, and when he pressed a dying pillow in far-off England, he said with his last fleeting breath, "In America I was born, in America I grew to manhood, and in America I fought the battles of my country; but in America I have not a friend."

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Napoleon marched to fame, but he marched over broken oaths and betrayed trusts, and though he wrote his name with the sword in the snows of the Alps and lighted all of Europe with the flames of Moscow, the widow's wail and the orphan's cry that followed in his wake were heard above the shouts of the Old Guard and Napoleon found his last abiding place on a lonely island in a lonely sea, an exile from all the world.

Gentlemen, we appeal to you today for a vindication of the law and a triumph of truth and justice.

The attorneys for the defendant have not discussed the facts of this case with the jury. I never saw the facts of a case so discommode a bunch of lawyers as in this case. Judge Gallagher opened for the defense and he hadn't talked fifteen minutes until he was sick unto death and asked the court to excuse him.

Newt Williams next came with flags all fluttering for the conflict, and he had scarcely entered upon a discussion of the facts when his voice left him. In days of old the Lord struck people dead for misstating facts, but it seems He is more generous today and only takes their voice away.

Next came Stratton, with much vigor and vitality, and perceiving the sad misfortunes of those who had preceded him, made an effort to avoid the facts, the promontory against which Gallagher and Newt had dashed their frail barks, but he was soon lost, flopping and floundering in the whirlpool of the law.

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Then came Lud Williams, the leading attorney for the defense, and of course we expected Lud to discuss with his usual earnestness the facts in the case. Yet he did not mention one word about the shooting. He never discussed for one moment what Duncan was doing when he was shot nor did he even attempt to explain the shots that hit him. Lud long since learned that when you strike a stump and can't dig it up, go under it or over it, the best thing is to quietly pass around it. He satisfied himself in an argument of an hour and a half, in abusing Duncan as a quarrelsome man and discussing the different business matters Duncan had engaged in during a busy life of forty years, and comparing Duncan's size with that of Johnson, as if it was legal in Texas for a small man to shoot a big one. He dwelt at length on the conversation that took place between Johnson and Duncan on the morning of the killing, but each time Lud would work up to the moment of the awful tragedy that cost Duncan his life, never a word said he.

On the morning of March 18, gentlemen, A. P. Duncan left his home unarmed, a follower of peace. Johnson, according to his testimony, had on his person an automatic pistol, loaded to the muzzle, an instrument molded and manufactured for the sole purpose of destroying human life. Each of these gentlemen arrived at his place of business in this city that morning between seven and eight o'clock. Duncan was the manager of the Waco Machinery

and Supply Company, and Johnson was a traveling salesman for this concern. This was on Monday morning, and it seems that on the preceding Saturday Duncan had stated to Johnson that he desired him to make a visit on Monday to Calvert.

So, on this Monday morning, Duncan reminded Johnson that he was to make a trip to Calvert that day. Johnson replied that he would only have an hour between trains, and that he did not think he could do anything with getting acquainted with the prospective purchasers in an hour. Duncan replied that he could stay all night and visit all the hardware and gin men of Calvert. Johnson replied that he had a contract as traveling salesman that did not require him to remain away from Waco overnight. Duncan disputed that there was any such contract between them. They discussed the matter for some time, each becoming more or less mad, and Duncan told Johnson he was a liar, and that if he disputed his word he would mash his nose over his face, and applied to him other uncomplimentary expressions. Duncan, though, stated to Johnson that if he thought he had such a contract as this he might go and make a list of the towns near Waco that he could make in a day and return to Waco at night, and he would consider it. This ended the first conference.

After a short separation of the two, Johnson returned with a list of forty-odd towns. Duncan took this list, excused himself from Johnson, and went in the small office, where Bruce Duncan and

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Mr. Martin were at work on the price list, and for some ten or fifteen minutes Mr. Duncan and Bruce Duncan and Mr. Martin discussed among themselves as to whether or not Mr. Johnson could visit these towns and return to Waco each night, and do paying work for the house. They reached among themselves no absolute conclusion as to the matter, but Mr. Duncan stepped to the door of the little office in which they were sitting and called to Mr. Johnson to come in there. Mr. Johnson came and took a seat in this little office, and Duncan said to him: "Johnson, we have gone over this matter and we don't believe you can make these towns and return to Waco every night, and make any money." Johnson stated again that he had such a contract, and said he was going to hold them to it. At this time Mr. Duncan applied to Mr. Johnson language that was unbecoming and the use of which I, of course, do not approve.

While this conversation was going on Mr. Johnson got up out of his chair and started out of the office. As a matter of fact, he did go out some eight or ten feet, saying that he was going after some witnesses to this conversation. Mr. Duncan said to him: "You come back here and sit down, we don't need any witnesses; we will talk this matter over and settle it among ourselves." When Mr. Duncan said this Mr. Johnson returned to the door of this small office in which they had been sitting; he did not sit down, but put his right foot in that chair that was sitting

directly in the doorway, and they again commenced their conversation about the contract. While this argument was going on Johnson, so the witnesses stated, slapped his right hand on his right knee and then put his hand back in his coat pocket. He did this several times while he and Duncan were discussing the contract. Finally Duncan got up out of his chair and stepped just behind it, and as he did so he said to Johnson, "You have no such contract with us as you say you have, but if you think you can be a man and will stop trying to stuff these lies down my throat, you may take this list of towns you have prepared and see what you can do with them." Johnson, just at this time, as we understand the evidence, took his right foot down out of the chair and fired at Duncan.

Mr. Williams stated to this jury that Johnson had stood as much abuse from Duncan as any man ought to stand and that the language that Duncan applied to Johnson called for a pistol. I want to say to this jury that the law is that it makes no difference what one person may call another, it does not justify an assault of any kind, much less a killing. Moreover, Johnson in his testimony declared that the language that Duncan used to him had nothing in the world to do with the shooting.

Now, gentlemen, you will observe that you cannot consider as a justification for this killing the conversation that took place between these two parties, first, because the law says you shall not do it, and

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second, because Johnson does not claim it as a defense. Neither is it any concern of this jury as to who was right or wrong in reference to this contract. They differed as to the contract they had made, but as to what was in that contract, it sheds no light on the guilt or innocence of this defendant. If the time ever comes in this country when civil contracts between our people are to be enforced with Mauser rifles and Gatling guns, then let us haul down the flag purchased by the blood of our fathers. Let us tear up the code that crystallizes the wisdom of the ages, and place in its stead the code of Napoleon, who declared that right was always on the side of the heaviest battalion.

Gentlemen, any juror who will render a verdict contrary to the law violates both the letter and the spirit of the most solemn oath that ever linked the soul of man to God's eternal throne, and ought to have placed on his brow the brand of Cain that all might know and shun him, and in his heart ought to rankle until the Judgment Day the curse of Judas. I not only asked you gentlemen if you *could* try this defendant according to law, but I asked you the additional question if you *would* do so, and each of you said you would, and I challenge you today to return back to this courtroom a verdict of not guilty, basing that judgment upon any conversation between these parties. The nightingales of a clear conscience would never again perch on your pillow to sing you to sleep at night, but the ghosts of the perjured and the

wicked ones would flit about your sleepless bed, and the scorpion lash of an accusing conscience would be your companion until your dying eyes read the rapt and mystic meaning of the skies.

This case is reduced down to one point: Did Johnson shoot to save his life? A man has a right to kill another to save his own life. That is both the law of Texas and the law of nature; and if it was necessary for Johnson to kill Duncan to protect himself from death or bodily harm, this jury would be rendering a righteous verdict in acquitting him.

In passing upon the motives and acts of these two parties, let us consider when and where Johnson got the pistol with which he killed Duncan. He testified that he brought it from his home that morning. He said also that he carried this pistol in his sample case as a protection to him when he was out on the road. Now, Mr. Johnson had not been on the road and had not been away from home overnight for about two months. During this time his pistol was in his sample case, which was in the store where they worked. He says he carried this pistol home with him Saturday afternoon and brought it back with him Monday morning.

Did he carry this pistol home Saturday afternoon? We are of the opinion that he did not, because we proved by him that he had another pistol at home. Of course, he would not take that pistol out of the sample case that had been in the store some time and take it home when there was no occasion for him to

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take it home, already having one there. Now, if for any reason he took it home on Saturday afternoon, he would not have brought it back with him Monday morning, because there would have been no occasion for his doing so, as he did not expect to be away from home overnight.

Mr. Johnson testifies that the purpose of this trip to Calvert was to secure the friendship of prospective purchasers of hardware and gin supplies. The evidence indicates to me that this pistol was in the sample case, which was where it had been for some time, and that after Mr. Johnson and Mr. Duncan had their first dispute about the contract, some thirty minutes or more before the shooting, at which time Mr. Johnson became very much enraged on account of the language that had been applied to him, Johnson, while knocking around in the store, went to his sample case and got the pistol and put it in his pocket.

Let us now see just what Mr. Duncan was doing when the first shot was fired. Johnson testified that Duncan was rising from his chair and reaching with his right hand in front of Bruce Duncan, so Johnson thought, for some weight, inkstand of some kind, with which to do him violence and that with his left hand he was reaching for Johnson's throat. Now, I will have you gentlemen to remember that the distance between the center of the chair in which Duncan was sitting and the center of the chair in which Johnson was sitting was only three and a half feet, that Johnson was standing by his chair

with his right foot up in it, slapping his hand on his knee and putting his hand back in his right coat pocket.

Johnson says that he never thought of shooting Duncan until he saw Duncan making for him with his left hand and reaching with his right hand for something on the desk with which to do him violence, and that after he saw him doing this he then decided that his life was in danger and drew his gun and shot him. Johnson was standing there, according to his testimony, with no idea of shooting Duncan, until Duncan commenced to make an effort to reach him, and after that Johnson put his hand in his pocket, threw the safety off of his pistol, pulled the pistol out of his pocket, pressed the spring behind the handle and then pulled the trigger. Yet during all this time Duncan never got anything from the desk and never touched Johnson.

Is Johnson's story reasonable? Johnson shot Duncan in the back of the wrist of the right hand, the ball entering about an inch below the wrist bone and coming out about an inch above it. He also shot him in the left arm, the bullet entering the front and under side of the arm below the elbow and going up the arm and breaking the bone midway between the elbow and the shoulder blade. He also shot him in the side through the ribs, the bullet passing through the liver, and he shot him once two inches from the backbone.

I submit to you that these shots could not have

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taken place and hit Duncan as they did, with Duncan in the attitude that Johnson places him. It is a physical impossibility. The bullet holes in Duncan's clothes and the bullet holes in Duncan's body cannot falsify. Death closed Duncan's mouth, but not these bleeding wounds. No man standing in front of another man can shoot a man in the back of the hand, the bullet entering and coming out as it did in this case, with that hand reaching with the palm toward him for something on a desk at his side. No man can shoot another one in the side and the bullet pass through the liver and lodge in the right hip bone with that man approaching toward his assailant. No man can shoot another one in the back while that man is coming at him to seize him, and no man can shoot another one in the left arm when that left arm is stretched out straight toward his assailant and the bullet take the course that bullet did in Duncan's left arm.

Now, what was Duncan doing when the shots were fired? Bruce Duncan and Mr. Martin, both of whom were sitting within two feet of him, said that Duncan had gotten up out of his chair and was standing erect behind it with both of his hands folded across his breast, and it was then, when he was standing in this attitude, that he told Johnson that if he would be a man and stop stuffing lies down his throat and would get out and see if he could make those towns and make some money for the house, he might go and try it; and then it was that Johnson drew

his gun and fired. Mr. Graves, who was sitting in an adjoining office, the partition between the two being glass, also testifies that Duncan had stood for a minute or more with folded hands just before the shots were fired. Here are three eyewitnesses that cannot be impeached, who swear before this jury that Duncan was making no effort to assault Johnson, but that he was standing in an attitude of peace, with folded arms, before a single shot was ever fired.

Gentlemen, the shots themselves verify the testimony of those three witnesses, and prove absolutely, beyond the question of a doubt, that they are telling the truth, that Johnson's defense is merely a lawyer's defense, and cannot be sustained by a single eyewitness nor proved by a single shot. When Johnson was on the stand I asked him if he could explain to you how it was that he hit Duncan in the back part of the right hand when that hand was reaching out toward the desk at his side, and Johnson standing in front of him, and Johnson said, "I can't explain it." I asked him to explain how it was that he could hit a man in the side when that man was making an effort to grab him, coming at him face foremost, and he stood before this jury and said he could not explain it. I asked him to explain how it was that when Duncan was trying to grab him by the throat and was standing face foremost, he could shoot him in the back, and he said he could not explain it. Duncan could have grabbed him in his arms and choked him to death before Johnson had ever gotten out

his pistol, and I submit to this jury that the evidence is as clear as the skylight that Duncan was standing there with folded arms in the attitude of peace with the world. There was no more occasion for Johnson killing A. P. Duncan, so far as protecting his life was concerned, than there was to kill Bruce Duncan or Mr. Martin.

The distinguished attorneys for this defendant have denounced as unworthy of belief the witnesses for the State. They say that Bruce is a son of A. P. Duncan, and therefore has tried to vindicate him here. It seems to me that Bruce Duncan's testimony is just the same as Johnson's testimony up to the moment of the shooting. He does not seek to protect his father as to the improper language used about Mr. Johnson. I submit to this jury that Bruce Duncan's testimony bears on its face the seal of truth, and that his conduct in the witness chair carries with it the ring of sincere conscientiousness. In my opinion, Bruce Duncan possesses that bold, rugged, open honesty that characterized his father, and that he would not swerve from the truth even to protect the memory of the one whose name he bears. Under the fast flying darts of a fierce and feverish cross-examination, Bruce Duncan, though drinking from grief's full cup, displayed a fidelity, a truth, a spirit of fairness and as bold a manhood as ever characterized a youthful cavalier fighting beneath a plume.

They say that Martin is not to be believed because

he is interested in the concern. Martin is but an employee, the same as Johnson. Why should they denounce him as being unworthy of belief, when Johnson himself testifies to the same thing that Martin testifies to up to the moment of the shooting?

They have denounced with much vituperation the witness, Mr. Graves, who happens to be a farmer living some twenty miles from Waco, who came to this establishment on this morning during the time of the conversation of those four parties in that private room, and went in this adjoining office and sat down. All the witnesses testified to this fact, even the defendant himself. That Graves was in this adjoining office, separated by a clear glass partition, there is no question; five different witnesses place him there. The witnesses testify that the conversation between Johnson and Duncan was loud. If it was loud and Graves was in the adjoining office it was natural for him to look, and if he looked he could see through the glass. We have proved that he could see from where he was sitting to where Duncan was standing. It is gross as well as groundless to say that Graves is a perjurer when he testifies to this jury that he was looking and saw through that glass, and that when the first shot was fired, and for a full minute before, Duncan was standing with folded arms.

I want you gentlemen to keep in mind that the law only excuses Johnson for shooting Duncan if he did so to save his own life. That is the law. Johnson says that he shot Duncan for no reason whatever

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except to save his life, and that he would have shot him if he had been the best man in the world. I want to remind you that we have no unwritten law. Our forefathers died at Bunker Hill and at the Alamo; they suffered at Valley Forge and at Goliad; they marched to victory at Yorktown and at San Jacinto, that you and I might live in a land of written laws. That juror who comes out of the jury box and renders a verdict on some imaginary unwritten law is not honest with his country, he is not honest with himself, he is not honest with his God. He ought not to be permitted to invoke the law to protect either his life or his property. When a true man takes an oath as a juror, he tries the case before him on the law, and it alone, as it has been written by the iron pen of legislation in the statutes of the State and upheld by the courts of the country.

Gentlemen, who is this man, A. P. Duncan, that they have paraded before this jury as being unworthy to live in this land of ours and whose acts they have introduced here as a justification for this murder? Attorneys for the defendant have sought to degrade his name and disgrace his memory as a justification for the act of their client; with personal work and with detective hire they have followed his tracks like sleuth hounds from the dawn of his youth in the rude cabin of his father in Grimes County, in '73, to his palatial home on Austin Avenue in Waco, surrounded by wife and children. What do they find in his life of fifty-three years that was any justi-

fication for Alex Johnson to take that life? They first introduced a certificate from the district clerk of Grimes County showing that in 1873, when A. P. Duncan was fourteen years old, he and his older brother were jointly indicted for murder. They introduced that certificate of indictment and stopped. I charge them with knowing, when by this method they sought to blaspheme the name and memory of A. P. Duncan, that he never fired a gun or spilled a drop of human blood!

[Mr. Williams:] Mr. Neff, I would like to correct you there; we knew no such fact.

[Mr. Neff:] Then I charge, Mr. Williams, that if you did not know it, you ought to have known it, and with one half the same diligence you exercised through your detective hire to hunt up this indictment of 1873, you could have learned that A. P. Duncan was innocent of any wrong. Yet so desperate were the dark and devious methods of this defense that they were willing to let it go before this jury as if Duncan's youthful hand had been stained with human gore. And when in the presence of this court and jury I inquired of the leading attorney for the defendant if he had in his possession any record showing the history and disposal of this indictment of A. P. Duncan in 1873, he stated he did not, and kindly volunteered the information that he understood the records of Grimes County had been destroyed by fire.

We did not let the matter rest there, for we leave

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no stones unturned when innocent blood runs red in the streets of our city. We hastened a courier to the courthouse of Grimes County and we brought the clerk and his records of 1873 before this jury, records that had never been destroyed by fire; records that the clerk said defendant's detective read there; records that told of A. P. Duncan's innocence. We didn't stop with these records, as we sought to defend the memory of the dead. We, by living witnesses who participated in the affair of 1873, in which a man was killed, proved that A. P. Duncan had nothing in this world to do with it, but that this indictment was merely a matter of form, in keeping with the unsettled condition of affairs that existed in that county during the carpetbag days of 1873, when the judiciary of E. J. Davis rode roughsod over the rights of those who stood for law and order. Now, gentlemen, what had this indictment of 1873 to do with the tragedy of 1912?

Next they introduced to the jury some evidence that about twenty-five years ago A. P. Duncan, while in business in Calvert, hit a man over the head with an ax handle. They bring the man here from far-off New Mexico to show that this incident took place. The man who was hit, of course, says he was doing nothing. We got out of him, however, that the difficulty arose about collecting a debt that this man owed the Duncan house.

How many accounts do you suppose have been collected and how many settlements have been made

with different parties by Mr. Duncan during his busy career of nearly forty years? I take it that ten thousand would be a conservative estimate, and yet during all his busy life as a wholesale dealer and retail dealer they are not able to prove that he ever had any difficulty with any man about any debt, except this one time. And these same attorneys who gloat before this jury over this one little fact would not permit us to prove by the defendant when he was on the stand how many fights he had had in a life of thirty-four years.

They next trailed Mr. Duncan to Temple, where they proved that in a business transaction there he and his associates had a friendly difference. Not an unkind word was said so far as this record shows, but just a business difference about how to run a hardware store.

Then they introduce the war of words between Duncan and Kramer in regard to the lease of a hotel; only a tournament of words and nothing more.

They next say that while here in Waco, Duncan, one of the directors of the Exchange National Bank, and some of the other directors of the bank differed as to policy. No assault was made on any one, no violence was used by any one; but the directors of the bank merely disagreed among themselves as to how the bank ought to be run. Only this and nothing more.

Then they introduce a witness to prove that a short time before the killing Duncan told a contractor here

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in Waco that if he didn't on that day remove a scaffold he had put up in front of Duncan's place of business, which had been there for more than two months, and which Duncan had requested this contractor often to move, he would employ some one to tear it down himself.

Those are the incidents, gentlemen, that these learned lawyers for this defendant have seen fit to parade before this jury in an effort to defame the name of A. P. Duncan and prove that he was not worthy of protection under the laws of Texas. What do you think of such testimony as a defense for the high crime of murder? Have they properly portrayed to you the real Mr. Duncan, the man who fought his way single-handed in this world from an humble clerk of a hardware store to the head of a great institution here in Waco? Is it right for them to say because once in life he hit a man with an ax handle, which incident took place a quarter of a century ago, that they can now invoke that against him when we try at the bar of this court one whose hands drip with his blood?

The testimony is that for the past twenty years Duncan has been a citizen of our own city. His life among our people has been an open book. Attorneys denounce him with much vigor because they say he weighed two hundred and twenty pounds and measured six feet two inches in height. He was a man big in body, big in heart, big in brain, with a purpose and a conviction that caused him to stand for his

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rights. He was no sissy in the corner. He inherited his bold, open, progressive spirit from his father, the Methodist preacher of Grimes County, who carried the glad news of the lowly Nazarene to that section of Texas in dark and stormy days. In the veins of A. P. Duncan flowed the pioneer spirit of the native Texan.

Let us look around us today and see what are the monuments to his manhood; not what we proved by our witnesses, but by those witnesses that the defendant put upon the stand to defame his name. We showed by them that here in the shadow of the courthouse stands the Auditorium Building built by the herculean efforts of a committee of our people, of which A. P. Duncan was the moving spirit that made it possible.

Then when the Methodists of Texas proposed to build in Waco a home for the orphan children of the State and a committee was selected from the denomination throughout the State, the conference of that great religious gathering selected A. P. Duncan as the one man in Waco best suited, best equipped and best qualified to make possible a philanthropic institution of this kind. He not only helped to bring it into being, but it was his strong hand that guided its tottering footsteps and directed its development into a loving mother within whose sweet embrace is protected each year hundreds of the orphans of Texas. On the board of directors of that institution A. P. Duncan served to the very hour of his death.

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Then it was proven by those who testified against him that when the time came to build the beautiful Austin Avenue Methodist Church, A. P. Duncan was on the building committee and was one of its stewards and able defenders and supporters from the day of its dedication.

Gentlemen, I place these monuments of his sterling worth against the vigorous vituperation of the hired attorneys for the defendant. The auditorium stands as a monument to his love of his country; the orphans' home as a tribute to his interest in his fellow man; and the church as evidence of his reverence for his God. These three monuments stand today at the head of A. P. Duncan's new-made grave and are the silent witnesses that denounce in no uncertain terms the assault that is made upon his name.

A. P. Duncan, however, needs no defense at my hands. He stood four square to all the world and proclaimed his views and maintained his rights in the business affairs of both church and state. He was a mighty oak in the forest of Waco's achievements and when he was cut down it left a gap in the sky and a chasm in the earth. Shall it be said here today that A. P. Duncan did anything to forfeit his right to live in Texas?

I would also remind you, gentlemen, that during Mr. Duncan's business career of many years, the defense with all their ingenuity and all their efforts have not been able to bring one single employee of his before this jury to testify that he ever had with

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him a difficulty of any kind, and yet for four hours of argument they denounced him as being an overbearing, browbeating boss. This defendant is the only employee with whom he ever had an unpleasant word so far as the record shows.

We hear much discussion today, gentlemen, about the conservation of our natural resources, and it is indeed proper that we protect our timbered lands and rivers, but it seems to me that we need today a revival about the sacredness and the dignity of human life. A human being is today the cheapest commodity in all Texas.

Attorneys for the defendant have argued before this jury that Duncan was wrong when he applied certain epithets to Alex Johnson. I grant you, gentlemen, that that is the truth, but have we reached the point in the disregard for human life, that we think when a man does wrong he ought to be killed? The law does not contemplate that; the law throws around a human being the dignity of his creative being. It has always been wrong to murder. Notwithstanding the first man that was born in the world took the life of the second, yet, from the day that Cain's hands were stained with the blood of his brother, murder has been wrong. To kill may be human, but for jurors under their oaths to approve it, is not divine.

We need today a crusade in Texas, led by a Peter the Hermit proclaiming that human beings are sacred and that a human life should not be shot out

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for a trivial offense. I lay this blame for the disregard of human life where the blame belongs, at the feet of the jurors. It is no trouble, gentlemen, to get a jury to convict a midnight marauder who steals a meal to keep from starving. It requires no effort to prosecute the pilferer who picks a pocket to feed hungry mouths at home; but when a human being, with life and hope and aspirations, a human being with wife and home and family, a human being made in the image of God, living a life sublime and possessing a soul immortal, is shot down in cold blood, it is considered one of the passing incidents of the day.

In days of old, Mount Sinai thundered and the hand of God came out of the clouds and inscribed on tablets of stone, "*Thou shalt not kill.*" That was but the record of a great moral principle older and more enduring than the rocks of Sinai themselves. It would have been wrong to murder if the inscription had never been made. Yet it is more dangerous in Texas to steal a yearling, so far as punishment is concerned, than to kill a man.

I can take any ordinary jury and bring some negro or poor outcast white man before the bar of this court, indicted for forgery, or theft, or burglary, and I can introduce one or two witnesses, and they will pace out of the jury box and hasten back and hand with much gusto a verdict to the clerk that reads, "We," with emphasis on the "We," "find the defendant guilty and assess his punishment at con-

finement in the penitentiary," and as the clerk reads their glorious verdict, they roll their victorious eyes about the courtroom like George Dewey viewing the fortified heights of Manila Bay and saying, "You may fire when ready."

These jurors pass out of the jury box and stick their thumbs in their vests and declare that they are in favor of an enforcement of the law and that all you have to do with them is to show that the man is guilty and they will send him to the penitentiary, and yet you can put those same twelve men in the jury box and introduce testimony of the killing of some one, and they rack their brains and create imaginary laws and couple up with the testimony imaginary facts, to turn the defendant loose in the face of the law and in the face of the testimony.

I noticed in the paper the other day that the district judge of Tarrant County had called a meeting at Austin of the district judges of the State to remodel the code of criminal procedure in reference to murder cases. It seems to me that this district judge would be performing a higher duty to his country if he would gather together the citizens of Tarrant County and have them to explain why it was that during the year 1911, out of twenty-five indictments for murder there, the jurors of the county did not convict in a single instance. You jurors cannot shift the responsibility. You cannot dodge your duty. If you desire to be a party to the sentiment that a human life is not sacred and that every man who does wrong should be

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killed, then perform the act and take the responsibility. The law against murder was made for the protection of the innocent more than for the punishment of the guilty, and it is for the living and not for the dead.

The law in reference to murder, like other laws, should be upheld. The law is the foundation of the State and on it our civilization rests. You pass finally on the question as to whether or not the law should be enforced. The officers may all perform their duty, and yet by your verdict you may tie their hands, lower the flag of the State, and disregard the law. If this jury under their oaths and in the face of the law and testimony in this case permit this defendant to go unpunished, and by a verdict you place the seal of your approval upon a crime like this, then we ought to take from the dome of the courthouse the classic form of the goddess of justice and place in her stead the fierce features of some hideous hag from hell. If this change should not be made, then the goddess who hovers today above us ought to tear the bandage from her eyes, throw the scales she holds in her hands into the streets of our city and wing her flight to some other clime.

It is hard to realize that this tragedy was real; that it was not merely some scene from Dante's *Inferno* or some picture painted by a matchless Milton in *Paradise Lost*. But, no. A. P. Duncan was shot as he stood with folded arms here in Waco, not only the Athens of Texas, but where glittering

church spires point their fingers of worship to the throne of Him Who said, "*Thou shalt not kill.*"

If the evidence of three witnesses to a tragedy like this, eyewitnesses whose testimony cannot be successfully impeached and is corroborated by the physical facts, is not sufficient for a jury to convict, then I ask, what would you require at our hands as proof to make out a case? That you gentlemen will consider as truthful the witnesses we have introduced I have no doubt. It has been argued that our witnesses have differed in their testimony. Only four witnesses saw any of the shooting; we introduced three of them and the defendant introduced one, Miss Bolger, who only saw a very small part of it. I submit to this jury that all four of these witnesses have related substantially the same facts. It is impossible for four witnesses to see the same thing exactly the same way, and if they relate the truth about it in their testimony they will naturally vary in minor matters. Matthew, Mark, Luke and John, the truest witnesses in the noblest cause in the march of man, did not agree in their testimony as to the inscription that was placed above the Saviour's head as He hung on the cross, and yet their testimony has been received as truth by the religious world. Bruce Duncan, Mr. Martin, Mr. Graves and Miss Bolger have come nearer stating the same testimony than did those Biblical witnesses in days of old about the simple inscription that each read and observed.

I don't believe you will set Graves' testimony

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aside as an eyewitness to this transaction merely because Lud Williams denounced him as unworthy of belief. They argue against Graves' testimony because during the afternoon of the killing Graves rode out in the country with Ed Castleman, and when Castleman asked him as to what he knew about the killing, Graves replied that he would tell what he knew in the courtroom. In this I cannot but commend the wise judgment of Mr. Graves. If he had gone over the country telling what he knew they possibly would have brought into this court some unknown citizen, some maverick that happened to be through the community, to testify that Graves told him a different story from what he told here. Moreover, it is not always personally safe for a witness to tell too many material facts that he knows about the killing of a human being. Sometimes such witnesses "wake up dead."

I repeat, gentlemen, these three eyewitnesses corroborated the bullet holes through the clothing and through the body of A. P. Duncan, and the bullet holes corroborated these three witnesses. Duncan was making no advancement on Johnson; he was not reaching for him with his left hand, but he was standing erect and upright with hands folded before a shot had ever been fired, and Johnson, while he was standing there and refusing to sit down, was running his hand from time to time in his right hand coat pocket. He was working up his courage and getting his consent to resent the language that Duncan had

applied to him, and while he was putting his hand in his pocket and slapping his hand on his knee, in his heart was pulsating the thought of murder. Johnson killed Duncan wilfully and deliberately.

In the face of this awful crime they have sought to vindicate the act of their client by pleading that he has been a peaceable, law-abiding citizen. They discuss with much power and pathos the glory of a good name. But, gentlemen, no man ever attains so high that the arm of the law cannot reach him, and no man should ever descend so low that his whispering voice cannot be heard in the temple of justice. If the time ever comes when a good man is permitted to kill a bad man, then no man's life will be safe in this country. If the time ever comes when the humblest man cannot invoke the law in his behalf, the hour is not far distant when the governor in his mansion will not be safe. Almost any man can prove by some of his neighbors that he has been a peaceable, law-abiding citizen. Some of the darkest crimes that ever disgraced the docket of any court have been committed by those who up to the hour of the tragedy bore stainless names.

I would not seek to rob Johnson of the good name his friends say he bears. I have known him for years, as a friend, and I regret that it has fallen to my sad lot as your prosecuting attorney to arraign him before the bar of this court charged with this high crime; but for me to falter now in the discharge of my duty would prove to him and to you that I was not worthy

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of his friendship and was never worthy of your confidence.

The attorneys for the defense have also had much to say about the good wife that sits by his side. She has my sympathy, too. I knew her and her people in the halcyon days of youth, when she, free from life's cares and responsibilities, passed away her happy young days in the homes on the everglades that fringe the timber lands that skirt the old Leon river, a stream around whose banks cling and cluster some of life's sweetest recollections. I would be glad if the bitter cup could pass from her lips untasted, but as is too often the case, the innocent suffer from the crimes committed by others. The kith and kin who grieve for him are the sad and serious events that follow the blood-tracks of crime. As a man, I pity Johnson, as a friend, I sympathize with him; but as an officer, I hear naught but the clear bugle call of duty.

Gentlemen, I have done my best during these eight days to uphold with courage and fidelity the stainless banner of the prosecution. As the burden now passes to your shoulders, on your hands goes the blood, and at your feet will be laid the blame if there is a miscarriage of justice here today. If you permit this blood to remain on your hands it will remain there forever, and you will cry throughout all the coming years with Lady Macbeth whose hands were stained with the innocent blood of Duncan in Shakespeare's play, "Will these hands ne'er be clean?" and from

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the gathering gloom the answer will come, "Never, no, never."

This, gentlemen, is no ordinary case, and your verdict will be no ordinary verdict. Inhabitants of three worlds are waiting for it. Clio, the muse of history, riding in the golden chariot of time, will pause in her onward flight to eternity to write with her wrinkled finger in the log book of the old ship of state the verdict of this jury. A. P. Duncan will come back like Alcestis from the grave to stand in spirit form with those he loved on earth and fill once more the vacant chair at the old homestead, and vindicate the life he lived and justify the death he died. Cherubim, the swift messengers of God, will herald your verdict and your thoughts to the recording angel who chronicles on high the affairs of men.

Standing amid the fast thickening tombs of the murdered dead, compassed about as you are by witnesses seen and unseen, I beg of you that no false sentiment and no false sympathy cause you to forget the State whose loyal sons and patriotic citizens you are. George Washington wept as he signed the death warrant of Major André, but with falling tears and with breaking heart he did not forget for one moment the duty he owed his country. If the time ever comes when the fleeting sympathy for a defendant becomes in the jury box superior to sense and more binding on jurors than duty, then the time is near at hand for your children to behold the goddess

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of our liberty standing with bowed head and streaming eyes before the broken columns of our fallen Republic.

Attorneys, with pathos in their voices, and with tears glistening with the dollar mark, have discussed before this jury many things to arouse your sympathy. They have presented issues for which we are indebted to the fertility of their imagination as the record of this case does not reveal them. If they desire you to consider sympathy as an issue in this case, then we are ready to match and meet them there; for I have but to point you to her who wears the widow's weeds, whose generous presence has hallowed the hours and softened the conflicts of this trial; who stood with the man of her choice at the marriage altar years ago and there joined hands and locked hearts with Perry Duncan, to fight with him the battle of life; and now, by no act of Providence, by no wrong of hers, but by Johnson's sin alone, is forced to walk in silence and in sorrow life's dark Plutonian shore, saying at every step to Johnson, as Grief said to Poe's raven, "Take thy beak from out my heart and take thy bust from off my door." At her feet the blooming flowers of spring will never spread their foliage again and above her head no more will bend the golden sky of summer. Throughout the weary days and the still more weary nights, "e'er slumber's chains have bound her," she lives, just lives, because "fond memory brings the light of other days around her."

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If sympathy they dare make an issue, then I would have you remember that the shots that Johnson fired not only robbed the beautiful Duncan home of its head, the wife therein of her partner, but the two daughters — God bless them — just blooming into womanhood, were deprived of the pride of their lives, and the three sons before reaching their manhood were robbed of their counsellor; together, throughout the coming years, they will long for the touch of the vanished hand and the sound of the voice that Johnson stilled.

Gentlemen, in the name of the great State of Texas, a State consecrated to law by the blood of heroes and dedicated to humanity by the prayers of patriots, I submit this case to you, trusting that your verdict will not cause the flag of the State to be lowered nor the escutcheon of your county stained. On one hand stands your country with her laws, her institutions and her honor; on the other side are the facts that Johnson made and the crime that he committed. As you stand at this solemn hour with this awful trust and solemn responsibility upon you I leave as a parting word to ring in the courts of your consciences the clear call to duty that Elijah proclaimed from the heights of Mount Carmel: "*Choose you this day whom you will serve.*"

After twenty-four hours' deliberation the jury found the defendant guilty, and assessed his punishment at ten years in the penitentiary. After serving three years he was pardoned by Governor James E. Ferguson.

The Trial of Professor Strunk

IN the Circuit Court of Floyd County, Indiana, in October, 1886, presided over by Judge Charles G. Ferguson, occurred one of the most notable trials in the history of that State. It was the trial of Prof. Ira Strunk, of the New Albany Business College, charged with the murder of Charles V. Hoover.

The prosecution was conducted by Hon. Frank B. Burke, Prosecuting Attorney, assisted by Hon. Asher G. Caruth, Member of Congress, William Kinney, Esq., Jacob Herter, Esq., and other able counsel.

Professor Strunk was represented by Major James V. Kelso, Alexander Dowling, afterwards Judge of the Supreme Court, and Colonel Charles L. Jewett.

Professor Strunk admitted the killing, the defense being that the deceased had violated the virtue of his home. It was the old, old story of the unwritten law. Technically the legal defense was that the situation had so operated on the defendant's mind as to bring about its temporary overthrow and thus relieve him of criminal responsibility.

The address of Colonel Jewett in behalf of the defendant was a masterpiece and will favorably compare with the loftiest of forensic efforts.

Colonel Jewett's Defense of the Accused

YOU are to be congratulated that we are nearing the end of this painful trial. I am sure you deserve sympathy for the self-denial you have been compelled to observe in order to properly discharge your duties as jurors. Nearly a week ago you were agreed upon by both parties and called to the jury box according to the forms of law, because it was believed that you were individually worthy of the station. You were shut out from all communication with your families and the public, denied access to the newspapers, and your seclusion has gone to the extent that acquaintances were not allowed to address you the ordinary salutations of the day as you passed to and from this courtroom. All this was done for the proper purpose of keeping your minds free from external bias, that you might at this time come with unclouded judgments to a free and honest consideration and understanding of the law and the evidence of the case on trial before you.

We have reached that point when it becomes my duty to present to you our understanding of the truth of this case. I am profoundly impressed with the importance of that duty, and ask your generous indulgence and careful attention while I endeavor to truthfully and faithfully present the defense of Ira G. Strunk, the wronged and unhappy man for whom I speak.

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You were sworn at the outset to try and determine this remarkable case according to the law and the evidence. That obligation rests upon you alone. It is the duty of counsel to bring before your minds all the evidence and argument which the wisdom of the law permits. It is the duty of the judge to preside over the trial, to instruct you as to the law, and to jealously guard your movements from the time you were impaneled until your verdict shall be received. But upon you rests the solemn duty, which tolerates no partial discharge, that under the sanction of your lawful oath you will true deliverance make between the people of the State and Ira G. Strunk, the prisoner at the bar.

I have spoken of this as a remarkable trial, and it does indeed present many remarkable features, some of which I shall be compelled to discuss, even though they may not be strictly within the record. I had hoped that the argument might be limited to the proper issues of the case. We had no desire to discuss some of those things which have, unnecessarily, it would seem, been dragged into the case by my distinguished friend from Kentucky, Colonel Caruth. We had no thought of discussing what sort of a man Charles V. Hoover was in his life, and certainly as far as it was possible did we desire to shield and spare Mrs. Myra Strunk.

I may surely be pardoned for at this time speaking of one of the extraordinary features of this case, which must have occurred to the most careless ob-

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server. I refer to the array of counsel for the prosecution. We had expected to be confronted by Mr. Burke, the prosecuting attorney, who is now closing six years of service in this circuit, marked with fidelity and signal ability. And we are not surprised at finding here that painstaking lawyer, Judge Herter, the deputy prosecutor, who has done like service. But we find also Judge Lafollette and Colonel Tuley, lawyers of New Albany, who have that age, experience, ability and personal worth which justly impress their efforts here with great weight. They are not under any obligations to appear for the State, and their association with this prosecution warrants me in saying that it is to a great extent a private undertaking, to the success of which some individual is contributing his personal means.

More than that, the State of Kentucky has been invaded in the search for talent with which to crush our unhappy client, and today the Circuit Court of Jefferson County is deprived of the service of one of its most important officers. I believe that the jails of that Commonwealth, particularly at Louisville, are overcrowded with criminals of much worse taint than this defendant. If the services of Colonel Caruth as Commonwealth Attorney are not absolutely required there, it is certainly true that there is ample employment for them at least.

Besides, during this trial the greatest political struggle which ever shook Louisville has been going on, and closes tomorrow, and upon the result of that

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my friend Caruth has staked his entire political salvation. Yet some great and overpowering inducement has been offered him to forsake all else and remain with us, giving all of his vigor and ability to the noble effort to convict an innocent citizen of Indiana. Gentlemen, no small reward would suffice for this service.

But that is not all. My distinguished friend, Major Kinney, of Louisville, is also here. He is a man whose life from earliest manhood has been inseparably connected with the administration of criminal law in Kentucky. His voice has been heard in hundreds of courtrooms in defense of men charged with all grades and varieties of crime, yet he is induced to leave his thriving business and all the great opportunities of the great city of Louisville and come here to add his voice in crying this man down as the paid counsel of the prosecution. I say he is paid; because his instincts as a lawyer and a man would lead him, if a volunteer, to join our side of this case. Yet Kentucky, a State not widely famed for the enforcement of her laws, still further weakens her legal machinery by the presence of Major Kinney upon this forum.

This array of counsel might well appall us were we waging a battle of forensic eloquence, but, happily, the cause of the defendant rests upon the inherent justice and strength of his defense and not upon the real or apparent ability and resources of counsel. And I have only referred to it, gentlemen,

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in proof of what we have always held, and what you must have ere this discovered, that this is not a prosecution by the State of Indiana, but a private persecution of Professor Strunk by those who would, if they could, crucify him where he stands, amid the ruins of hearth and home, a broken-hearted, distracted man.

Among the remarkable things of this trial the speech of Colonel Caruth may well be classed. While it would be a departure from good breeding to call it a harangue, I would equally violate the truth to call it a legal argument. I know of no man whose talents better fit him to present in its best light the weak and shabby case made by the State. I think those who, from motives of malice or revenge, assist to prosecute Professor Strunk, acted with unerring cunning when they secured these two distinguished Kentuckians to come here and attempt to convict this poor man in the house of his friends. No better argument can be made on the side of the State than was made by Caruth. Why? Because the case is inherently weak, the prosecution a fraud, and acquittal certain. You heard his speech throughout, and I ask you in all candor, what was there in its whole extent that was calculated to inform your understandings or enlighten your judgments? Though you were sworn to try the case according to the law, what law has he either read or quoted for your information? Notwithstanding you are to be governed by the evidence, what reasonable deductions did he

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draw from all the volume of testimony given in your hearing? None. The entire scope and purpose of the speech was to inflame your minds upon the subject of murder, and to endeavor to thrust the defendant's disgraced wife between him and that justice which cries out for his deliverance. This sort of talk, interlarded with abuse of the defendant's witnesses, Shephard and Suddath, constituted the entire plea made in your hearing by the learned gentleman.

But, on reflection, I see a good reason why my learned brother was not able to cite you any cases bearing directly upon the case we are now trying. To have value as a legal precedent, the case relied on must have been decided by some court of last resort — that is, some court from which there is no appeal, and must be found among its printed decisions. Tested by this rule, there are no authorities in such cases, because there have been no convictions from which to appeal. Prosecutions like this — no matter where carried on — in every State and country where civilization makes virtue precious and its defense heroic, have invariably ended in the acquittal of the slayer. No jury has ever failed to hold that man blameless who crushed beneath his heel the viper he found hissing upon his hearth. No court has been found to condemn the man who slays the serpent he detects gliding into his marriage bed. No, gentlemen of the jury, in such cases there are not, nor will there ever be, any authorities, but

they will ever be decided upon that principle to which Ira Strunk yielded, because it was implanted in his heart by his God, and nurtured by his own pure and blameless life.

Gentlemen of the jury, the indictment charges the prisoner with the crime of murder in the first degree, in that in this county on the 27th of July last he did, with premeditated malice, murder Charles V. Hoover.

In this State there are three grades of felonious homicides: *murder in the first degree, murder in the second degree, and manslaughter*; and manslaughter is either voluntary or involuntary.

When the killing is done purposely, maliciously and with premeditation, it is murder in the first degree. If there is no premeditation, it is murder in the second degree. If the killing is done purposely, but in a sudden heat, caused by sufficient provocation, it is voluntary manslaughter. If the killing is done unintentionally, but in the execution of some other unlawful purpose, it is involuntary manslaughter.

There is little need for me to dwell upon these matters, because the facts in this case are not in dispute. At the beginning we admitted enough to show that, in the absence of the special defense pleaded, the prisoner would be guilty of murder, and it is but fair to strip the case of all rubbish, and declare to you that the entire contention on our part does not involve any denial of the fact that Professor Strunk killed Charles V. Hoover as charged, and under the tragic circumstances detailed by eye-

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witnesses; but we rest his defense upon the broad ground that he is innocent, because at the time of the killing his mental condition was such that the killing was not his act.

The law indulges several presumptions in such a case as this, and in the absence of any proof such presumptions are conclusive. Some of them favor, others are against, the defendant. For instance, the law presumes Ira G. Strunk to be of sound mind and to intend the natural consequences of his deliberate act, and hence it follows that the State was not bound to prove that Strunk was sane at the time of the killing, or that by firing the fatal shots into Hoover's body he intended his death. These things are, so to speak, taken for granted. On the other hand, the law presumes in his favor that he is a man of good character, and that he is innocent. And this presumption of his innocence attends and shields him at all times from the very moment he is accused until he is shown by the evidence to be guilty beyond a reasonable doubt.

When arraigned upon the indictment, Professor Strunk said he was not guilty, the usual and formal plea in all criminal cases, and one which puts the State to the proof of all the material facts in the case, and permits a defendant to avail himself of all defenses in bar of the charge save one — insanity. But those of us who then and now compose the counsel for the defense, early believed the existence of the state of affairs since shown by the testimony, and so, in com-

pliance with a recent statute, we pleaded for our client the further plea that at the time of the act he was not of sound mind. Upon that plea the State joined issue, and so it has come to pass, through agreements, admissions and concessions, that this case has narrowed down to that single issue — was the defendant at the time he killed Hoover a person of sound or unsound mind? Upon the solution of this question rests the determination of this case, and your labors are thereby simplified if not lightened.

It is true Colonel Caruth told you that we would contend here that Strunk had the right to be his own avenger and might lawfully slay his wife's seducer. Such an intimation was gratuitous, and originated in the Colonel's own lively imagination. For you, gentlemen, are sworn to uphold the law, and far be it from us to ask you to do less. And the law is that no matter how grievously Charley Hoover may have betrayed the confidence of Strunk; no matter how deeply he stained the prisoner's marriage bed with the scarlet sin of adultery, that fact did not authorize Strunk to take his life.

The first inquiry naturally is this — when is a man, in contemplation of law, a man of unsound mind? For, mark you, we do not pretend that the insanity of Professor Strunk at the time of the tragedy was of that character and to that extent that he was a raving maniac, a frothing madman or a drooling fool. We say that, judged by the legal test, he was of unsound mind, and consequently in contemplation

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of law not criminally responsible. Our statute defines the phrase "person of unsound mind" to mean any idiot, non compos, lunatic, monomaniac, or distracted person.

Gentlemen, I submit, under the authority of the Supreme Court of our State, the law to be as follows:

First. That there is no legal test of sanity, but that it is a fact to be determined by the jury in each particular case.

Second. That the approved apportionment of the mental powers divides the faculties of the mind into the cognitive or comprehending powers — the feelings, — and the conative or will power. Our Supreme Court adopts this division of the mental powers, announced by Kant and accepted by the metaphysical and physiological schools of mental philosophers of the whole scientific world.

Third. That insanity is a disease, to be recognized and treated as such, and that it is a disease which may and often does affect one of this great trinity of mental faculties without visibly affecting the others.

Fourth. That a sane mind exists only when all these faculties are unimpaired, and that a sane man must be possessed not only of the power of comprehension, whereby he is able to fix and determine his just and proper relation and duties to men and things, but must further be possessed of sufficient will power to control his actions.

What, then, becomes of this labored attempt by

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testimony and argument on the part of the State to convince you that at the time he fired the deadly shot, Professor Strunk "knew the difference between right and wrong," knew it was right to obey the law, and wrong to take human life? The question goes only half way, and we might well concede that the position of the State is correct and that the prisoner knew he was doing wrong in killing Hoover. Because even if that were true, yet if, as the evidence overwhelmingly shows, he was at that time so mentally affected that he had not the power of control, his knowledge of the criminal nature of the act goes for nothing. Why? Because in the absence of *will* the shooting was not his act. It was no more his act than if I had, against his resistance, placed the revolver in his emaciated hand, and, pressing his nerveless finger upon the trigger, produced the shot that forever stilled the passionate heart of Charles V. Hoover. In such a case his hand would have fired the fatal shot, but the act would have been mine, the blood would have been upon my head.

Gentlemen, it is also the law of Indiana that before a defendant can be convicted the jury must be convinced beyond a reasonable doubt of his sanity. It is thus stated in the syllabus to the Stevens case in 31 Indiana Reports:

"So far as a person acts under the influence of mental disease he is not criminally accountable, and the jury in a criminal case must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged."

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Now, what is the reasonable doubt of which the law speaks, and the existence of which precludes that moral certainty of guilt which alone authorizes a conviction? Briefly stated from Starkie on Evidence, as qualified by our own court in the Bradley case, a reasonable doubt exists, and a juror ought not to condemn, unless the mind of the juror be so convinced by the evidence that he would venture to act upon that conviction in matters of highest importance and concern to his own interest under circumstances where there was no compulsion resting upon him to act at all. This state of mental conviction must exist in order to afford moral certainty of the defendant's guilt.

Burrill in his work on Criminal Evidence says:

“Moral certainty is a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which cannot, morally speaking, be avoided consistently with adherence to truth.”

Here, then, we rest. This is the pivotal question in this case — have you upon all the evidence in the case any reasonable doubt of the defendant's sanity at the moment he took the life of Charles V. Hoover? You may, if you please, resolve every other question in favor of the State. But I ask you to withdraw your minds from the consideration of all the misconstruction placed upon the testimony by the other side; to refuse to decide or even consider the false

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issues sought to be raised; and address yourselves to this inquiry. Is there a reasonable doubt of the defendant's sanity at the time of the tragedy? If so, he is not guilty; and certainly there can be but one answer to the question.

Gentlemen of the jury, in the course of your deliberation as to the sanity of Professor Strunk at the time he slew Charles Hoover, you will have to rely on three sources of information, and I will present them in the following order:

First. The conduct and actions of the defendant before and at the time of the killing.

Second. The opinions of ordinary witnesses to the fact of insanity.

Third. The opinions of the very learned experts with whose testimony we have been favored in this case.

In the consideration of the first branch of the testimony, we may well take our cue from a very frequent expression from the lips of witnesses who have testified in your hearing. You will readily recall that many of them said in substance that prior to the tragedy and after the scandal had been freely bruited, Strunk seemed to be a changed man. And one witness to the fact of the shooting, Mr. Gelbach, has said, "It was not like Professor Strunk to do such a thing."

These witnesses unintentionally give to you a most valuable formula for determining the mental condition of the prisoner at the time of the fatal

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encounter. For in the use of these expressions, they mean nothing more or less than that it is the result of a mental comparison of Professor Strunk as the ruined, desperate, and distracted man he was at the time he slew Hoover, with the man whom they knew as Professor Strunk before his great self went down under the weight of the accumulated horrors that beat upon his head. So I ask you now to consider the evidence as bearing upon the life and character of my client in the days of his happiness and usefulness, and compare him, not with others, but with himself, at the time of the fearful event which has brought him here to answer the awful charge of murder. This I ask you to do, not from any statement of mine, but from the evidence in the case before you, and the legitimate inferences which you may draw from it.

The testimony shows that Ira G. Strunk came to make his home in New Albany about fourteen years ago, when a young man of twenty-four. He was born and reared among the hills of Pennsylvania. He sprang from that stock of Pennsylvania Germans whose sturdy virtues have everywhere compelled respect; a people noted for steadfastness of purpose; strong but undemonstrative in their affections — reasonable in their desires — subdued in their passions — sincere and decisive in action. Thus it was that Ira Strunk came to man's estate, strong of heart, and with fixed and relentless ideas of marital duty, but at the same time with a nature open and

unsuspicious and wholly unfitted to understand — far less to suspect and ward off in advance — the hellish arts of the libertine. He was a young man without wife or child and his ties of kindred were limited to the old father he left in comfort behind, the brothers who, like him, sought the opportunities of the great West, and the tender memories blossoming around the mound that marked his honored mother's grave. This was the beginning in this city of the blameless life of Ira G. Strunk, and I appeal to you if in all the testimony in this case from the day he first set foot in New Albany to the moment when this wretched business came to a shameful and bloody end, there is disclosed one thought or act of his of which the purest nature might feel ashamed. Yet through the supreme irony of fate, this man is charged today with a crime the penalty of which is death.

Possessed of a superb business training, he early conceived the idea of founding a business college. The undertaking was hard and encouragement slight, but with unflinching faith in himself he went forward, and the result is seen today in an institution which is henceforth inseparable from the history of New Albany. It has given for many years to the youth of New Albany and vicinity an opportunity for instruction and usefulness of which they eagerly availed themselves, and the scores of young men who during this trial have forsaken their busy lives to crowd lovingly around this broken man proves how

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well he did his part toward them. Their regard and assistance to him in his great ordeal have been his chief support and none may realize more than he that —

Kind hearts are more than coronets,
And simple faith than Norman blood.

It was while thus intent on the duties of a useful and wholesome life that my client met the woman who was to win, to occupy and finally to break his heart. We may well understand how with youth, health, a clean life, and every prospect of success in business, there came to him, as there comes some time or other to every right-minded man, the desire to take a wife. Myra Sullivan was a woman possessing charms of person and manner well calculated to attract his notice. The daughter of honest parents, reared among the refining influences of good society, educated and accomplished and of fair fame, sharing his love of music, and thus often thrown in his society, is it strange that he loved and sought her?

But mark you, gentlemen, he sought her honorably — not with the red thirst of lust, or in secret concubinage, but in holy, honorable marriage. He sought her that she might stand as his wife beside his proud and loving heart, that through the day his willing hands and brain might toil for her comfort, and at night he might find rest and content in her pure embrace. It was thus that Ira Strunk sought

and won Myra Sullivan for his wife. And when they left the altar, united in that state ordained by Heaven and sanctioned by society, he was happy. If any skeleton sat at his marriage feast he did not see it; if any shadow darkened his bridal bed it was unnoticed by him.

Gentlemen, he had the right to be happy. He had the right to believe that the spotless woman he had taken to his heart would remain there while life endured. He had the right to expect that through all their lives she would be his companion, his consolation and his pride, that she would walk hand in hand with him through the years, and in the end would receive the last look of love from his dying eyes. He had the right to expect that such children as might come to them would ever have her watchful care, and that by no act of hers or Charles Hoover's would they ever lose it. And he had no cause to believe that the day would ever come, that now certainly approaches, when he would be compelled to guard their young lives from the mother's fearful example and put away from their thoughts even their mother's name for fear its bare mention might bring to them the shameful story of her disgrace. For the evidence shows, gentlemen, that of this now unhappy union, two children were born, and cruelly enough, it happens that they are girls. They are of that sex most susceptible to injury from the tongues of decrying gossip, and from their helplessness most in need of the offices of a loving, virtuous mother.

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They have been at all times the object of deepest solicitude to this wretched client of mine, and it has only been at the thoughts or mention of them that tears have fallen from his brave eyes.

But as I have said, for a long time the defendant was very happy in his home and family, and life seemed full of promise for him. He carried on his business college in connection with his friend, Professor Hammond, and was highly successful. He was the secretary of one of those building associations, so popular in this community, whereby small savings of the wage workers are brought to valuable accumulations. He engaged in keeping the books of the Odd Fellows' Aid Society, and took a lively interest in that order, of which he was an honored member. Yet he found time from his many tasks to do the works of charity as a neighbor, and the testimony shows that he often visited the sick, and his voice sang hymns of consolation over the dead.

This was the condition of this man's life a year ago, — but now how changed! This man who, a year ago, walked these streets a free and prosperous citizen, a loving husband and father, sits here today with the fearful charge of wilful and contrived murder written against his name. This man, when we adjourn this evening, will not return to a happy home, virtuous wife, and fond children, but to his later abode — the common jail of Floyd County. And this is his unhappy lot until such time as your verdict, as I firmly believe it will, shall set him free.

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For all this accumulation of misery and horror, some one is responsible, and we shall see who it is. I assure you that my client is not its author.

I turn aside here to answer the question so persistently asked by my learned friend from Louisville. Over and over he reiterated the question, "What kind of a man do you think Charles Hoover was?" I am not permitted to say anything outside of the evidence in this case, but if I were it would not avail, for I knew but little of him, and that was good. But I will tell Caruth what kind of a man the testimony shows Hoover to have been, and in doing so I do not desire to wound the feelings of relatives, for from them I have received nothing so far but kind and courteous treatment. But I am not permitted to follow my instincts in that regard entirely. This defendant has entrusted to the gentlemen who, with me, defend him, his defense, and has in effect said: I am charged with the gravest crime known to society's law; see to it that no word proper to my defense is omitted.

So I answer the question of Colonel Caruth from the evidence, and will tell him what kind of a man Charley Hoover is shown to have been. For it is one of the hard conditions of human existence that we must be judged to be in fact what we appear to be in manner and deed. And I may well submit to you that in all the brief life of this slain man there is little shown which we can either admire or approve.

There is nothing in the testimony showing an act

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of unselfish friendship, nor does any confidence appear to have been reposed in him, that he did not betray. The testimony certainly shows him to be the debaucher of one woman and the destroyer of one happy home. He first appears in this evidence at Maienthal's store, and when confronted with the just rage of a wronged husband, he owes his life to a defective pistol, crawls behind a counter and emerges fifteen minutes later from the secure refuge of a coal cellar. He next appears on Market Street, and this time finds shelter behind the frail body of his father, and when that shield is shot down takes refuge and finds bloody death in a barber shop.

Dr. Hoover says that Strunk shot him intentionally and then fired again, and tried to shoot the third time. I think he is mistaken in this, but if correct, gentlemen, must you not conclude that Professor Strunk was insane at the time? What sane man would attempt to kill an unarmed old man against whom he had no grudge, while his real enemy was near at hand? No, gentlemen, that evidence proves too much, but if they are willing I guess we will not complain. Thus far at least, gentlemen, there is nothing shown in regard to Charles Hoover of which any one could feel proud.

Now, I believe that aside from his association with the wretched wife of the defendant, the woman whose name he has forever covered with ignominy, the testimony only discloses Charles Hoover in one other place, and that was on a railroad train near

Vincennes. There, according to the testimony of John Jones, he was found seated beside a woman so vile that the story of her shame was written on every feature of her brazen face. So palpable was it that Jones, as a friend of his, reproved him for being seen with so rank a courtesan in a public place. What do we find him doing after this creature had left the train? Making a communication to Jones that ought to have blistered his tongue while he spoke it.

While society offers no excuse and little palliation for illicit intercourse between a man and woman, there arises out of it at least one obligation, and that is, the unwritten law which obtains among gentlemen that the woman's guilty secret shall at least be sacred to her partner in guilt. The wife who defiles her marriage bed, disgraces her husband and blasts her children's names, has lost nearly all, but this much yet remains to her — she is entitled to the silence of her paramour. Charles Hoover ought at least have observed the command —

“Let not thine own tongue be thine own shame's orator.”

Does not the testimony further show that Hoover most cruelly betrayed the confidence of Professor Strunk? You have seen that Hoover and Mrs. Strunk were much thrown together as members of the Episcopal choir. Now, I am not usually charged with being old-fashioned, but I am not particularly impressed with the choir system. In the good old day every saint and sinner praised God out of his

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own throat, and that system would have avoided this trouble. But I will not rail against church choirs. However, it seems to me that when a vain, rakish young man and a handsome married woman demean themselves in the same choir as Hoover and Mrs. Strunk did, the best thing for that choir is to deplete it to the extent of their retirement. Be that as it may, I think you will agree that Hoover shamefully abused Professor Strunk's confidence. He came to Strunk's house to bring music and to sing, was received as a friend, caressed his children and then seduced his wife! Why, gentlemen, even the wild Arab scorns to injure one whose salt he has eaten!

The testimony in regard to the improper relations that existed between Hoover and Strunk's wife has been admitted solely for the purpose of showing the effect the discovery had upon the mind of Professor Strunk. Do not wonder that, though the town was ringing with gossip about Mrs. Strunk, her husband was the last to hear and the slowest to believe it. I honor those who do not hear, or little regard, the tongue of slander. I know of no place where a greater number of competent persons can be found to attend to other people's business free of charge than New Albany. And it is to his credit that when he did hear these things he resented them as slanders and sought to punish those who spoke. Oh, noble, trusting soul, that loved and believed no wrong! Strunk trusted his wife implicitly; remember that, gentlemen.

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It is written, gentlemen, that the sins of the parent shall be visited upon the heads of the children to the fourth generation. But the guilt of Hoover and defendant's wife reaches further than that in its blight. It has not only wrecked the life of the husband and father, but the holy church has been defiled by the rites of their lust. The church deserved better treatment than that from these two members of its choir, but, alas! did not obtain it.

As I stand here there rise before my mind two scenes in that church disclosed by the evidence, but ah, how fearfully unlike they are. One of the scenes shows a bright Sabbath morning when the bell calls to worship, and Professor Strunk, with his wife and children, goes forth and joins the throng of pious souls who enter the house of God. Professor Strunk sits with his children reverently in his pew, while the wife of whose beauty and musical skill he is so proud, takes her place at the organ. The choir assembles, and Charles V. Hoover takes his place as its leader. The robed minister appears and utters the solemn warning, "The Lord is in His holy temple, let all the earth keep silence before Him." The service proceeds and the commands of the Decalogue are repeated and responded to, and presently I hear the priest proclaim those words which come to us charged with the thunders of Mount Sinai: "*Thou shalt not commit adultery,*" and from the organ, moved by the fingers of Myra Strunk, and from the lustful throat of Charles V. Hoover, comes back the re-

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sponse, "Lord, have mercy upon us and incline our hearts to keep this law." Oh, blasphemy incarnate!

But another scene rises before me. It is the same church, but dark, empty and deserted. The worshipers have gone. Professor Strunk is at his daily task, secure in his trust of home, wife and honor. The children are at home under the watchful care of their good grandmother, an honest woman, gentlemen, for whose grief I ask all your pity, for she is blameless and heart-broken over this wretched business. I see Myra Strunk leave her home, with a music book under her arm, and enter the church by unlocking a private door. I see the seducer stealthily climb the fence at the rear of the church; glide across the lot and enter the sacred building by raising a window at the rear. The picture is complete, the assignation has been kept, and I draw a veil over what the eyewitnesses say followed, when the very altar was defiled by a performance as vile and blasphemous as the worst that characterized the worship of Baal. Look on this picture, gentlemen, and then on that! What a fearful contrast between the two! How sweet and holy is the first one, how fragrant with all that is good and wholesome for home, church and state! How black with shame, infamy and burning dishonor is the other!

But, says Mr. Caruth, the testimony of Shephard ought not to be believed because improbable. He says that no sane man can believe that these people would leave the vestry door of the church open while

they gratified their mutual lust. Gentlemen, the persons who were so lost to shame as to resort to the altar of the living God for the practice of their adulteries would care little for other proprieties. They who dared in that most sacred place the gaze of the Omniscient Eye would take little care to the weak vision of man. Colonel Caruth says Shephard's story is improbable, and the witness a liar. Hard words prove nothing and convince nobody. I admit the story Shephard tells is a strange one, as strange as was the choice these people made of the place for their criminal indulgences. And if the story this witness told stood alone — if he had come upon this stand and alone accused these people — I would say that his testimony should be viewed with suspicion.

But, gentlemen, I ask you in all candor, if long before Shephard testified, you had not fully made up your mind as to the character of the relations that existed between Hoover and Mrs. Strunk. Even if Shephard had not testified, if Mrs. Shephard had not testified, — and they seem to be honest people, — would you have had any doubt as to the object Hoover and Mrs. Strunk had in their clandestine meetings at the Episcopal church? Did Shephard testify to seeing anything which you were not already satisfied had taken place in this closed and darkened church at their many, many meetings there?

A learned judge, Lushington, has laid down as sufficient proof of adultery the proof of these two things,

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first, that two persons have the disposition to commit the offense, and second, that they have had the opportunity. With this sort of proof this case bristles, but Colonel Caruth disregards all that. He contents himself with a savage attack upon the eyewitness, ignoring the further fact that all the other testimony in the case not only corroborates this witness, but makes his testimony impreguably true. It is an easy thing to call a witness a liar; and in the presence of the jury, and under the protection of the court, a safe thing to do.

It is not an argument against the probability of Shephard's testimony to say he is a liar. Do you know, gentlemen, that in this case you have listened to the testimony of one hundred and four witnesses? Now, in all that list, about the last one I would want to accuse of falsehood would be that bluff old river captain, Moses Irwin. The man who would attack his veracity would only fracture his own reputation. The splendid character which that good and honest man has built up by years of uprightness is not to be blown away by a breath, or tarnished by words of unkind and intemperate criticism.

But Colonel Caruth tried to explain away the testimony of Captain Irwin. He knew that if Irwin's testimony about seeing Mrs. Strunk with her head lying on Hoover's shoulder all the way from Louisville to New Albany on a steamboat, was believed, then you would be prepared to believe all Shephard swore to. And so he tried to explain and did you

ever hear so funny an explanation in your lives? He asks you in dramatic tones if you "ever came over the falls?" He says that the waves roll so high, and the vessel rocks so heavily that one can scarcely keep his feet, and asks you to believe that Hoover was holding Mrs. Strunk's head because the voyage made her sea-sick. Then why didn't they sit down? He says he knows this is so because he and Major Kinney have tried it.

Pray recollect, gentlemen, that every night this week Caruth and Kinney have been attending Caruth's political meetings in Louisville, and their heads are naturally light in the morning after. Besides, you know the sight of so much water as the broad Ohio contains is naturally calculated to make a Kentuckian feel weak about the pit of his stomach. But Colonel Caruth is very certain that to come over the falls of the Ohio on a steamboat is an undertaking of great danger, and to be made with caution. His description of the riffle, which we call "the falls," would lead a stranger to conclude that it was tempting fate to venture into those wild, tempestuous waters. He would have you believe that the sturdy sailors, those gallant tars who go down to the great vexed sea in ships, were always ready to lower the lifeboats, and were compelled to lash themselves to the spars or rigging, while the sea-sick passengers were holding on for dear life to anything permanently fixed. Mrs. Strunk, it seems, with great discrimination and rare presence of mind, held on to Hoover;

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she preferred him to a roustabout, and I for one don't blame her.

Gentlemen, the proof which has been introduced here in regard to the seduction of the prisoner's wife by Charley Hoover, and her subsequent infidelity to her husband, was not done with the hope or purpose of raising any issue upon the truth or falsity of the charge against these two faithless people; because you can readily see that when we concede that Professor Strunk was not in any sense authorized to avenge his wrongs by bringing the deceased to a violent and bloody death, it follows that proof of Hoover's crime would offer no legal excuse for Strunk's tragic deed. The sole and only legitimate object in making such proof was to show the great and grievous burden which their conduct laid upon the heart of my client, and under which his tortured and distracted mind gave way. If Strunk was in fact insane at the time of the killing, he is guiltless, no matter whether any sufficient reason for his condition existed or not. And if he were in fact sane at the time of the act, he must be found guilty under the law, no matter how deep his injury.

This is an honest statement of the law, and I am glad that we are able safely to rest our case upon it, in view of all the evidence. So it did not matter to us whether we proved the guilt of the wife or not — nay, gentlemen, we would be glad if it had been possible to have left the matter in some doubt, and that there might have been some loophole for a belief

in her innocence for the sake of womanhood and motherhood. It was enough for us to show that a state of facts existed which induced Strunk to believe he had been foully wronged, and that, oppressed with such belief of his shame, his mind tottered and fell from reason's throne.

But the gentlemen who so numerous and industriously represent the State here are not content to let us stand on this neutral and debatable ground. They insist upon arguing to you the falsity of all these charges, and seek with rare skill to explain away the many evidences of this liaison. And they compel us to meet them upon this point, and prove to you and all the world the truth of Myra Strunk's downfall, by their assertion that this act of Professor Strunk's was only the manifestation of an unreasonable jealous man's rage and desire for revenge. Aye, more than that, they cruelly asperse this brave and luckless man with the shameful innuendo that he is willing to falsely charge dishonor on the mother of his daughters in order to escape punishment himself. I brand such a charge as false in every statement and every implication. I hope to presently show you how Ira G. Strunk once had the choice of personal safety, at the expense of his wife's good name, offered him, but he rejected it with a brave, true man's just scorn, and chose rather mortal combat with his arch enemy and a home in our county prison. So I warn these gentlemen that if the verdict which you render in this case shall by impli-

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cation brand the brow of this fair, frail woman with undying dishonor, if it shall forever fix upon the name and memory of Charles Hoover the foul blot of a seducer's scarlet sin, the fault is not ours. We will but have met and vanquished these gentlemen upon a field of their own choosing, in a contest which they alone have invited.

Therefore, leaving out of sight the evidence of the man who saw only that which all other men know took place, I invite my learned friend, Major Kinney, to explain on some proper and decent hypothesis, consistent with the known and usual conduct of moral men and women, the conduct of Charles Hoover and Myra Strunk at other times and places as detailed by other and unimpeachable witnesses. I ask him to explain to you, on any theory consistent with innocence, why Myra Strunk's head rested lovingly on Hoover's shoulder, while his wanton arm encircled her waist, on the Evansville steamboat, all the way from Louisville to New Albany. If he resorts to his brother Caruth's idea that it was because of the rough water, let him please explain what sort of sea-sickness it was that led them, when they left the boat, to proceed down the river bank and disappear out West First Street at that late hour in the evening when the woman's home was then on East Fifth Street, and her trusting family awaited her there.

Let him explain the scene detailed by Captain Carpenter who saw this lascivious couple in Professor Strunk's own house at the unseasonable hour of

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10 o'clock at night, with her head again on his shoulder. Surely neither the house nor sofa was so swayed and rocked that any sea-sickness required this tender care on the part of Hoover then! And oh, gentlemen, how multiplied is the dishonor of that scene when we remember the facts as shown by the testimony that made Hoover's presence there safe, or even possible, at that time. Why was it that this meretricious love could at that time pollute an honest man's home? It was because at that very hour, in a far-distant State, Ira G. Strunk watched at the bedside of the dying father, whose cold form he, a few days later, helped to lay away in its eternal resting place.

Let him convince you that there was no wrong in the scene detailed by Mr. Hollmann who saw this foolish pair upon a public street car in the city of Louisville, apparently oblivious of all but their sinful selves; her with her head again on her lewd lover's shoulder, and traveling into that quarter of the city most sought by those most intent on evil.

Let him furnish some innocent motive that led these people to constantly seek each other's society, her to the neglect of all her wifely and household duties, him to the denial of the society of all the single and marriageable women whom he might lawfully and honorably seek.

Let him tell you why these stealthy meetings, these long walks, this clandestine exchange of notes, these mysterious signs and wanton gestures, that were of such daily and open occurrence, that they

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finally come to be known of all men, but last of all by the man most dearly concerned.

Let him construe as something else than an open, brazen assignation the note which Ferd. Hollmann saw dropped from the window of this man's betrayed home, and the word and its echo, "to-night" — to-night?

And let him further refute the damning fact that on that very night these people, shortly after dark, met near Wiley's shop, and in company went out Fifth Street and remained, they and Heaven alone know where, until 10 o'clock. Ah, but, says Colonel Caruth, "Is it unusual for musical people to spend an evening together thus, at the house of a friend in this city?" I do not know as to that, and cannot say that it is unusual, but this much I can say, that no man who escorted the wife of a friend to any proper place for any legitimate purpose would, on their return, leave her a square from her home to return to it alone clandestinely.

Will Major Kinney be good enough to tell us why this dead man and disgraced woman, if innocent of the awful charge against them, so demeaned themselves before this respectable community that they attracted the suspicious notice and provoked the unfavorable comment of hundreds? Can he give any good reason why they met at this church in the daytime as often as two or three times a week, she going and returning alone, and he creeping in through the windows? Can he explain why they remained

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there so long each time if they went for musical exercise, and yet no sound of the organ was ever heard? More than that, gentlemen, can he give any good reason why in that manner they should for any proper end meet there at all? Why, even the boy Huncilman was shut up for twenty minutes in the little room back of the organ while Hoover, according to Mrs. Strunk, "fixed the organ." I never heard of a musical instrument that had such an obstinate habit of getting out of repair as this one at the Episcopal church, and it would have been economy to have replaced it with a new one. But Mr. Hoover never charged anything for repairs, I believe.

But they say these were only indiscretions, those innocent actions which smack so strongly of evil and trench so closely on danger, but nevertheless are free from actual sin. Well, my friends, if they were merely indiscretions, they were deadly ones, for they have cost one man his home, happiness and reason, another his life, and a vain, foolish woman her fair name for all time. If they were only indiscretions, they were of such character that for the like you would condemn your dearest friend, and upon one-tenth such proof this court would decree any man upon that jury a divorce. But they were more than indiscretions — they were the acts of hateful sin, for over them all is written lust, lust, and the law of Heaven declares that "*lust when it hath conceived bringeth forth sin, and sin when it is finished bringeth forth death.*"

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What avails it, then, gentlemen, for counsel to deride and abuse Mr. Shephard, the witness who saw these people in wanton embrace inside the church? They sneeringly refer to him as a house painter, but I take it that to paint houses is as respectable as to practice law. And there was nothing in the manner or appearance of Shephard that warrants any man in believing that he swore falsely. The trouble is, his story was too plain, and he too clearly showed the character of the "indiscretions" in which Mr. Hoover and Mrs. Strunk were engaged.

But the prosecution were not content to risk the weight of Shephard's story, and I am not going to soil my lips by repeating it in this presence upon the theory of its improbability. And so it came to pass that counsel for the State, yesterday noon, organized an expedition to the church for the purpose of finding out whether it were possible for Shephard to see what he says he did, from the place where he stood. And probably no such cavalcade ever started to a church before — just think of it, gentlemen, Frank Burke, Asher Caruth and Major Kinney, all on their way to church at once. Surely the home missionaries may take heart at such a sight. With them went the other attorneys on that side, who I know are pious men, for Colonel Tuley belongs to my church. And in order to have abundant testimony to contradict poor Shephard they secured the services of two persons to act as witnesses. Mind you, their object was to prove that

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a man could not see into the church at the distance Shephard says he was, and so, with the rare tact which has marked their entire course in this case, they selected as their witnesses two excellent citizens of this place, Messrs. Axline and Cannon, who are so afflicted that they can't see much at best.

Now it occurs to me that this was a capital idea. Of course, the best man in the world to prove that you can't see a thing is a blind man. The next most valuable man is one with weak eyes, and Mr. Cannon says he has spent lots of time and money with a Cincinnati eye doctor, while Mr. Axline can't see to read without glasses. So equipped, these zealous lawyers went up and almost burglarized this little church. Following the bad example of the man whose misdeeds they here defend, they went in by a window. I should have liked to have seen Caruth's boots as they disappeared within. Now, there is something in the Bible about people who get in by any other way than the door, but I won't apply it to these gentlemen from Kentucky, for of course they did not know of it. At any rate they got in, and my friend Kinney, whose magnificent proportions have always aroused the admiration of the ladies and the envy of the rest of us, actually took to the floor. Then Mr. Cannon and Mr. Axline took their position out in Shephard's back yard, the vestry door was opened, and they looked in to determine whether they could see anything on the floor. Of course they could not see, gentlemen, for the sole

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purpose of looking was not to see, and it's an old adage that none are so blind as those who will not see.

So they could not see Major Kinney who was prone upon the floor, a martyr to his professional duty. Of course, they saw something there, but as to what it was they are at hopeless variance. Mr. Cannon, who is something of a hunter, thought it looked like a dog, while Mr. Axline, who deals in carriages, was equally sure that it looked like a horse. Whether one thought it a very large dog, and the other a very small horse, was not stated, but certain it is that neither of them dreamed that what they saw was my learned friend Kinney, whose pardon I beg for this free reference. Now, gentlemen, I have only spoken of this ludicrous performance at length to show you the desperate strait in which the prosecution finds itself, and the slender straws at which it grasps in its extremity. Certainly the whole absurd proceeding does not cast a cloud on the testimony of Mr. Shephard, and we are not responsible for Shephard's ideas of propriety. But really I don't think there is a man in this room who would not have done as he did and have seen all he possibly could.

I will not longer weary you with recital of the evidence of the guilt of Charles V. Hoover and Myra Strunk. Counsel upon the other side have challenged its proof, and I am content to leave to your honest judgments the decision of that question.

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But during all this shameful period, what of the defendant here? Simply nothing, aside from his plain, every-day discharge of duty as he believed and understood it. Frank, open-hearted and trusting, he kept the even tenor of his way, all unconscious of the black cloud that gathered above his head and threatened every hour to burst and destroy him. His guilty wife and her more sinful paramour found seeming security in his ignorance of the facts. But their secret had to be brought to light. Ira G. Strunk was becoming the pitied object of every gossiping tongue, and his children's name was becoming a byword and reproach, and God's eternal justice demanded that the truth should come to him, and come it did.

There is to me something grand in the conduct of this man, when to his unwilling ears came the first hint of his wife's dishonor. I have always admired most in the life and character of General Grant that trait which caused him so many pangs, his chivalrous refusal to believe anything to the discredit of those he trusted. And so with Professor Strunk, when the story of his wife's infidelity was first made known to him. Did he make haste to believe it, and with bitter words and hot accusation assail her? No, but he stood like a wall of adamant, and against his loyal heart the waves of detraction broke and scattered. He made haste to seek the author of what he fondly imagined was a causeless slander, that he might punish its utterance. And then,

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gentlemen, it was, that in the discharge of this high duty there came to him the knowledge of the horrid truth, and out of his anxious inquiries came the discovery of those shameful circumstances which have been detailed to you. Little by little he came to know that he had been betrayed, and under the weight of that awful truth, and all the accumulation of horrors that attended and followed it, he sank down and down to the ruinous depths where you see him today.

What did he do then, gentlemen? Did he, impelled by the keen revenge which counsel for the State ask you to believe possessed him, afterwards slay the seducer? No, but wronged and ruined man that he was, he kept the peace, observed the law, and sorrowfully went away from the home, once so dear, but now so hateful to him.

Oh! patient heart! Long and keenly have you suffered; be patient still. For the hour of your deliverance draws very near.

Gentlemen of the jury, I never knew this man except as a passing acquaintance until after the fearful tragedy in which he figured. We know each other better now, and I have learned to love his noble nature as deeply as I pity his ruined life. Yea, though he stood today upon the scaffold, I would be proud to clasp his hand. Gentlemen of the jury, when, after the death of Charles Hoover, I saw this man in jail, he seemed to me grand in all his proportions, and exalted above us all. Exalted

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because he stood there the mighty defender of woman's chastity, man's honor and God's religion. If a thief creeps stealthily at night into your house to steal your goods, you may lawfully slay him. If a man attacks one of you, and threatens great bodily harm, you may kill him and go acquit. If a foreign enemy or domestic traitor hoists the flag of invasion or insurrection, you may slay him, and the laws do not esteem your act a crime, but rather a patriotic virtue. Yet this defendant did more than that. This man fought in defense of a jewel more precious to him than all his goods. He killed Hoover in the protection of what is to an honorable man more than life or limb. He shed blood in the highest defense of the State, because in defense of the State's purest institution, marriage, and its obligations. This man's shots rang forth as proclamations of the sanctity of hearth, home and church all over this broad land.

From the moment that the fearful truth dawned on the loyal mind of the prisoner, and he left his home, he became a changed man. His hitherto unsuspecting nature became warped to one of doubt, suspicion and distrust. He evinced a morbid desire for further knowledge of the details and evidences of his wife's infidelity, and sought them with an absorbing zeal that was pitiful to contemplate. His only idea seemed to be that all others were equally interested with himself in the matter, and he refused to talk connectedly on any other subject. He even

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burst into the office of Mr. Fawcett, a comparative stranger, and insisted on talking it over with him. His friends found it impossible to win him from the subject, and one or two of them have testified to you that his manner was so excited and distraught that they actually were afraid of him. Nearly the whole community came to him with sympathy and condolence, but not all. There are those so sordid in their souls that they would coin money out of the heart's blood of unhappy humanity. And such came to him, and there then occurred a scene, the like of which I hope may never again disgrace New Albany. Men came to him to earn money by pandering to his distracted thoughts and morbid fears.

Longfellow has written in the beautiful story of Hiawatha —

“Never stoops the soaring vulture,
On his quarry in the desert,
On the sick and wounded bison,
But another vulture watching
From his high and aerial lookout,
Sees the downward plunge and follows;
And a third pursues the second,
Coming from the invisible ether,
First a speck and then a vulture,
Till the air is dark with pinions.”

So, gentlemen, to this sick and sorely-pressed man, wounded to the core of his faithful heart, in the hour of his extremity, came human vultures to fatten on his miseries. You have heard the testi-

mony of these two young men, one a witness for the State, the other for us, and though they widely differ as to what occurred, I think you will believe our witness. I am sorry for the other, because I respect the honorable name he has inherited. He says he told Professor Strunk that the other man had, before that, been employed by him to watch women. Will some one please tell what women he had any business to have watched? Who gave to him, a young, single man, any authority to have a watch put upon any woman? This very statement stamps the character of the witness as bad. Then he says that Strunk offered five dollars to have Hoover made drunk and decoyed to his house, that he might kill him. What an abominable statement! Professor Strunk required no such advantage — his noble nature would have scorned it. When at last the day came which Fate ordained should end the life of Charles Hoover, the prisoner, impelled by his insane impulse, took it, but he took it in open, fair and equal combat, and at least on equal terms. No, gentlemen, that statement, put in here to create prejudice against my client, must not be believed, for the whole history of this transaction is against it. It is on a par with the testimony of Dr. Hoover, that at the time of the shooting Professor Strunk came up on tiptoe, behind him and his son.

Gentlemen, there was no occasion for Ira Strunk to ever conceal his footfalls. His feet have always trod the path of duty. His feet have never wandered

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in the devious ways the libertine must take, nor have they ever trod down the hearts and hopes of the innocent; such a man need not tiptoe anywhere. Rather, then, let us believe, gentlemen, that the story of this other young man is true, and that nothing worse was said and done at that time than that Strunk listened to the promises of these men, and yielded to his then morbid desire for further proof and employed them.

It was some time after this that nature refused longer to sustain the fearful burden the prisoner's distracted condition put upon him, and he became dangerously ill. There could be no other reason than mental strain for this, for the testimony shows him to have been a man of strong health, and singularly correct in his habits. For weeks he was ill of raging fever, often delirious, and always intent on the story of his disgrace. The witnesses say he nearly died. Were we permitted to question Heaven's justice, I would say, would to God he had died. But it was not to be, gentlemen. He had drunk deep of the bitter cup of misery, but it was not yet to pass from his lips.

It was when he rose from his lonely bed of sickness, gentlemen, and again tottered forth to mingle among men, that we find his first meeting with Charles Hoover. It was purely accidental, for he entered Maienthal's store at business hours in the usual way, and found Hoover casually there. To what then occurred I have already called attention; noth-

ing was said by the defendant, and as to his thoughts we can only surmise. We only know that without comment or excitement he attempted to kill Hoover. The pistol hung fire. Hoover escaped, and the avenger suffered himself to be led uncomplainingly away from the scene of his attempted violence.

You must feel satisfied from the testimony in this case that even at that time the intellect of the defendant was greatly shattered, and it may be that the final ruin had occurred, but that the full evidence of it was not yet apparent. But I apprehend that up to this time there yet remained to my client some share of the large self-control; the power to respect the law and the disinclination to attempt the repair of a greater wrong by the commission of a lesser one, which had marked his conduct in the past. I think that this occurrence in Maienthal's store must have awakened in him for the first time the full knowledge of how great and deplorable might be the consequences of his remaining in New Albany among the scenes which reminded him of his surpassing loss. He must have realized that his meetings with Hoover could in the long run have but one termination. Then it was that he determined to leave New Albany forever.

There is something grandly heroic in the self-denial which prompted this resolution to sacrifice his business, forsake his chosen calling, and in a far-off State begin a new life on the ruins of the old one. For why should Ira Strunk go away? He had done

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no wrong, failed in no duty, proved false to no trust. Why should he be exiled? And then, gentlemen, he was leaving so much behind, taking so little with him, except his sorrows and the memory of his wrongs. His departure might be construed into flight, and at all events would leave his erring wife and her betrayer safe and secure in the enjoyment of their unholy passion. But for all that, he was willing to go away, and went to Mr. Hartman for a recommendation, saying that he wanted to find employment somewhere else.

Gentlemen of the jury, this century has witnessed no nobler exhibition of self-sacrifice than Ira G. Strunk here displayed. Had he been permitted to go, he might in some other place have set up his shattered idols, have gathered his children about him and found peace, although happiness can never again be his. Certainly, in that event, the tragedy in which Charles V. Hoover lost his life would never have occurred, yet by some strange fatality it was the act of Hoover that prevented Strunk from leaving this city forever.

It was last May when, warned by the first encounter with Hoover, Strunk determined to go and make his home in Florida. The grand jury of this court was in session, and learning of Professor Strunk's intended departure, Charles Hoover took the decisive step that cost him his life. He went before the grand jury and demanded and procured the indictment of this defendant upon a charge of at-

tempted murder. He caused him to be arrested and forced him to pledge citizens like Mr. Vernia, under heavy penalties, as security for his return, and thus it was that Charles Hoover, to all intents and purposes, committed suicide.

I think Hoover might have dealt more gently with the man he had so foully wronged. It is true that he had attempted to fire at him, but that had caused Hoover no damage beyond a most terrific fright. And it would seem, at least to you and me, gentlemen, that after all this defendant had suffered and lost, his arch enemy might have been a little more charitable. Charley Hoover had seduced his wife, separated him from his children, ruined his business, destroyed his peace of mind. Might he not have stopped at that?

Ah, gentlemen, the hour came when Charles Hoover would have given worlds had he possessed them to have recalled that cruel act. The indictment of Strunk for the attempt to shoot Hoover was conceived in a spirit of fiendishness that must have awakened the envy of hell. What was its primary object? Nothing less than that Professor Strunk should not be permitted to finally leave this scene of his wretchedness. But what was the ultimate infamy intended to be accomplished? It is my deliberate belief — a belief arising out of the evidence in this case — that Charley Hoover had a foolish pride in his conquest of the defendant's wife. It is a matter of common knowledge that this sort of

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vanity affects every young man in a high degree, and while Hoover had nearly reached middle life, he was far from having outgrown the follies of youth. His boast to John Jones, on the train, that he had an amour with a married woman of New Albany, shows that his vanity was tickled at the thought of his triumph over this weak woman's virtue. For the fact that he did not mention her name goes for nothing, and by no means concealed her identity. What man of you all, who knew of his constant attentions to this defendant's wife, of their meetings, correspondence and fondness for each other's society, would have had the slightest doubt as to who the "married woman" was? And, since it conclusively appears that these things were known to almost every one in the city, he might as well have given her name.

But by means of this indictment he was, he weakly thought, about to obtain a double gratification. He hoped to punish the man he hated, for it is human to hate those we have wronged. He hoped to compel this man to give notoriety to his wife's downfall, and thereby establish his — Hoover's — reputation as a Lothario. I doubt if in all reality or fiction there was ever contrived a more devilish scheme than this sordid plan of Hoover. He expected to sit in this courtroom and see this wretched man writhe as he was forced to choose between a felon's cell for the attempt on Hoover's life, or escape from it by proof that the mother of his children had been dishonored. And so, no matter how Professor Strunk

came through this ordeal of torture, the small soul that planned it hoped to be the gainer. The counsel who now appear for the State were employed then, gentlemen, and what they now do is only in pursuance of their original undertaking. Do you suppose that Professor Strunk, stunned and distracted as he was, did not understand this damnable scheme? If you do, I will violate his confidence far enough to tell you that his wavering mind grasped and understood it, and it was the final torment that induced his bloody act. We are engaged in a trial of Professor Strunk, gentlemen, but its character is changed, and the chief spectator is absent. Charles Hoover is forever absent in obedience to that relentless law, which is as plain as though written in fire across the starry heavens — the law that "*the wages of sin is death.*"

The testimony in this case has fully informed you of the gradual change which came over this man as the months went by. We have laid bare before you, gentlemen, all his life here and elsewhere, from the moment he acted upon his belief of the dreadful truth and left his home, up to the time of the final encounter. We have shown you how doubt gave way to despair, and despair was followed by desperation. We have shown you his sickness, his sleeplessness, his failure in his occupation, his loss of skill at his profession, his abstraction and grief, and all the multiplied evidences of mental disorder which preceded the ultimate wreck.

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The evidence shows that it was late in June when John Jones repeated to him the scandalous story that Hoover had told him on the train near the city of Vincennes. It was about the 20th day of July that the last meeting, so far as the testimony informs us, took place between Hoover and Strunk's wife. I refer to the meeting, on Main Street, in this city, testified to by Mr. Huette. And it was on the 27th day of July that, in the course of man's weakness and God's providence, the life of Charles Hoover reached its frightful end. The climax fittingly followed the preceding events I have named. What can be imagined more effective as final blows to this man's already overtaxed brain than the knowledge of Hoover's shameless boasts to Jones, accompanied by the knowledge of what Mr. Huette saw on Main Street.

And so we now come down to the events of the day that witnesses the culmination of this moral and social horror. That day at high noon is the period to which your investigation must eventually come, for to the condition of the defendant's mind at that hour all the testimony in this case has been addressed. For if he was a sane man at that time, it matters not how he may have been afflicted before or since. And if at that time his mental condition was such that he was not criminally accountable, his condition at other times and places is not of the slightest consequence. You will remember, gentlemen, that the testimony shows that he passed a sleepless night and at times walked the floor of his bedroom. In the

morning he complained of his head, and his whole appearance was wild and distracted in the extreme.

At 10 o'clock of that fearfully hot day, when every being not compelled to be abroad had sought refuge from the sun's heat, when all animate nature groaned and suffered from the heat, where do we find him? With his two little girls, whose presence he obtained Heaven knows how, wandering aimlessly down the levee at the river front. What a time, a place, for a promenade! It was then he said in tones of deepest tenderness to his children, "Darlings, we are not going over the river now."

It was there he declared to the ferryman in excited tones that his happiness was gone forever. Next we find him at the Windsor Hotel, at a little after noon, asking for a friend. How he became separated from his little girls, where he spent the two intervening hours, what he heard and did, is not shown. What wild thoughts passed through his heated and disordered brain we may never know. We do know that he failed to recognize an intimate friend, Mr. Grosheider, who passed and saluted him three or four minutes before Charley Hoover's death. We do know that when the author of all his woe passed by he pursued and slew him!

There is not a detail of all that terrible morning that does not point directly to the insanity of Professor Strunk. His conduct, seeing the kind of a man he was, cannot be explained on any other hypothesis. It is unfair to say that he was there lying in wait

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for Hoover to kill him, and there is nothing but the assertion of counsel to support the claim. Why of all days, should he select that one, and why, if that was his purpose, should he make an appointment at that time to meet a friend? What reason would he have to expect Hoover to pass up Bank Street, a most unusual route for him?

Gentlemen of the jury, I know your hearts go out to this ruined man, and you long for an opportunity consistent with your oaths to set him free. The way is plain and your duty and inclination coincide.

Leaving out of the case the testimony of the expert witnesses, we have that of thirty-three men from all the walks of life, men who knew him well, and observed him closely, who swear that he was insane. They are all honest men who have no further concern with the result of this trial than such as comes from the promptings of our common humanity. And opposed to all this testimony stands that of Dr. Sloan, who does not testify as an expert. I am willing you should give full credence to all Dr. Sloan said, for it was very little, but then it could not possibly be of more value than that of any one of our witnesses. And it certainly can not outweigh the testimony of thirty-three.

Add to this the testimony of the learned men who have made mental disease a life study, and the result is overwhelming. We have brought before you Dr. Fletcher, of Indianapolis, a man whose name must forever stand as that of a pioneer in the humane

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treatment of insanity. Under his wise charge there are today in our State hospital more than sixteen hundred unfortunates who are to a greater or less degree bereft of reason. To him they are indebted for the final removal and destruction of those horrid instruments of torture and confinement which so long disgraced the treatment and increased the miseries of those unfortunates. You heard him answer the hypothetical question which I had framed. You will agree with me that it only contained facts which had been testified to in this case by witnesses. And in answer to that question he said, with not the slightest hesitation, that in his opinion, at the time of the killing, Professor Strunk was insane.

Dr. Barnes is also worthy of highest credit, despite the sneers of counsel at his testimony. He has had large experience of a like character with that of Dr. Fletcher, and has made such matters a specialty. And Dr. Barnes is equally positive as to the defendant's mental unsoundness at the time in question. Then we have Dr. Voyles, a man in whose personal worth and professional skill we all feel the most profound confidence, and he supports the others.

Gentlemen of the jury, if there ever was a case where the much-derided defense of insanity was made out by the most convincing and overwhelming proof, this is certainly the one. And I am glad of it. I believe in this man's innocence, and am delighted at the overpowering proof of that innocence.

Colonel Caruth puts much stress upon the fact

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that as to many matters the defendant has at all times seemed to be rational. What of that? Do not the experts tell you that it is a most common thing to find one who is a monomaniac on some things and rational on all other subjects? You remember the case of Mr. Hord, spoken of by Dr. Fletcher. I mention this case with great reluctance, for Mr. Hord is not only a man in exalted position, a high-minded, courtly gentleman, but he is one of my valued friends. At the bar of this State he stands in the foremost rank, and his discharge of the duties of his office has been superb. Yet Dr. Fletcher tells you that he has not only been insane, but was for six weeks an inmate of the State asylum. And yet, when taken to the asylum, he was carried from his desk, where he was performing with rare intelligence the duties of his place, which require the highest degree of intelligence and learning.

Lest my silence might be misconstrued, I will say that the last witness for the State is one upon whose evidence I have no desire to comment. But this much I will say — and I mean no disrespect to the gentlemen on the other side of the case — I say that the introduction of the wife of the defendant as a witness against him was an exhibition of folly and brutality that is astounding. The necessities of this case must be very great when that woman is dragged here and forced to deny her guilt. What does her denial amount to? Did any one for a moment expect her to admit it?

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But, gentlemen, the same spirit which forbade us to ask her a single question forbids that I should speak harshly of her. For I can not forget that fact, which at the judgment shall be her chief claim to Heaven's mercy, that she was the wife of Ira G. Strunk.

I have already talked too long, gentlemen, but I could not find it in my heart to say less, and if any word of mine has been calculated to prejudice the defendant's cause, I pray you to hold it as my fault, and not to his disadvantage.

Gentlemen of the jury, somewhere in this city, at this moment, are two little girls. They inherit their father's spirit, their mother's fatal beauty. You might pass them by upon the street without notice, but to Ira G. Strunk they are all of life, for they represent all that he may rescue from the wreck of the past. The sunlight of childhood yet falls upon their heads, and their feet stray among the flowers of innocence. But they unconsciously go on toward a horrid abyss that yawns for their destruction. It is the shame that must come to them with the knowledge of the mother's degradation. From that awful fate the hands of but one person can draw them back. Shall it be, gentlemen, that by your verdict as doom draws nigh, those hands shall beat helplessly against prison bars? Forbid it, Almighty God! No, gentlemen, let these fragments of this stricken family be once again united. Let Ira G. Strunk take his daughters by the hand as he did on

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that fatal July day, and let him in answer to their pleadings say this time, "Darlings, we will cross the river now." It is time for them to cross the river, gentlemen, to lead each other far away from this scene of shame and misery. Let them go away, gentlemen, and in some other land let these children grow to woman's virtuous estate, and let there come no parting till his tired head finds eternal rest in the Master's bosom. See to it, gentlemen, that this journey begins at the close of this trial!

In less than one hour the jury found the defendant not guilty "on account of insanity."

On the afternoon of the same day another jury found Professor Strunk to be then of sound mind and he was promptly liberated.

The Famous Case of Dalton *Versus* Dalton

THE celebrated divorce suit of Frank Dalton against his wife, Helen Maria Dalton, based mainly on the charge of adultery, was tried in the Supreme Judicial Court at Boston, Mass., in May, 1856.

Soon after Frank Dalton was married to Helen Gove she became acquainted with William Sumner, and the relations of the latter two proved such as to excite the jealousy of the husband although he had no evidence of any criminal intimacy between them. One day Dalton assaulted Sumner and not long afterwards Sumner died. On the theory that Sumner's death was induced by this assault Dalton was arrested and afterwards indicted by the Grand Jury for manslaughter. His brother-in-law, E. O. Coburn, who was present when Dalton beat Sumner, was also indicted as being *particeps criminis*. At his trial Coburn was acquitted. Dalton was convicted of simple assault and sentenced to five months' imprisonment.

Dalton's wife confessed her folly and imprudence to her husband but insisted on her innocence of



COLONEL CHARLES L. JEWETT

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crime. At first Dalton believed this to be true, but several circumstances, which were greatly exaggerated by certain of his friends who sought to poison his mind against her, brought him to the conclusion that his wife was untrue. So he brought this suit for divorce.

He was represented at the trial by Richard H. Dana, Jr. Mrs. Dalton was represented by H. F. Durant and Rufus Choate. Mr. Choate made the argument to the jury in behalf of Mrs. Dalton.

It is thought by many that Rufus Choate was the greatest lawyer that ever practiced at the American bar. No reader of the following speech can escape the conclusion that he was at least a genius.

Webster said of him, "Choate is the only American who has equalled Pinckney as a lawyer and an advocate and he surpasses him. In the past it was asked, 'How near Pinckney is he?' In the future it will be, 'How near Choate?'"

Speech of Rufus Choate

MR. FOREMAN AND GENTLEMEN OF THE JURY:

TO both of these parties, the plaintiff and the defendant, it is of supreme importance, in the view I take of it, that you should find this young wife erring, indiscreet, imprudent, forgetful of herself, if it be so, but innocent of the last and greatest

crime of a married woman. Of course, gentlemen, her interest in such a result is perhaps the greater of the two. For her, indeed, it is not at all too much to say, that everything is staked upon the result. I cannot hope, of course, that any verdict you can render can give her back again the happy and sunny life which seemed opening upon her two years ago; or enable her to recall those weeks of folly and vanity without a blush, without a tear. But, gentlemen, whether these grave and impressive proceedings shall terminate by sending this young wife from your presence with the scarlet letter upon her brow; whether in this, her morning of life, her name shall be thus publicly stricken from the roll of virtuous women; her whole future darkened by dishonor and waylaid by temptation; her companions driven from her side; herself cast out, it may be, upon common society, the sport of libertines, unassisted by public opinion or sympathy or self-respect — this certainly rests with you. For her, then, I am surely warranted in saying that more than her life is here at stake.

But, gentlemen, if you can here and now, on this evidence, acquit your consciences and render a verdict that shall assure this husband that a jury of Suffolk, men of honor and spirit, some of them his personal friends, believe that he has been the victim of a cruel and groundless jealousy and has been grievously misled, if he could be made to believe and see, as I believe you see and believe, that this

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story of abortion, by which he has been induced to institute these proceedings against his wife, is falser than the coinage of hell; if you can thus enable him to see that, without dishonor, he may again take her to his bosom, let me ask you if any other human being can do another so great a kindness as this?

If by your verdict you can assure this husband that his first thoughts on this subject were right; that the steadiness and constancy with which he held his wife to his heart for many weeks after he became aware of every credible fact and circumstance that has been put in evidence in this case were just and honorable and true; if you thus restore him to his former and better self, before he was maddened by this malignant conspiracy by which he has been surrounded, will it not be he, rather than she, that will have occasion to bless you for your judgment?

It seems to me, therefore, gentlemen, if my learned friend on the other side will not deem it arrogance in me to say so, that I am here to maintain the cause not of the wife against the husband, but of both of them. I am here to say, that the husband has a right to his wife, and the wife has a right to her husband.

These parties were married in June, 1855. He was very young: she was only a child, not yet eighteen; comely and of remarkable modesty; affectionate and fond in her nature and disposition. She was the child of respectable, Christian parents. She was their youngest and not their least beloved, and they

had been diligent to afford her all those opportunities of education, moral and mental, which our Commonwealth offers to its daughters; and they had afforded her, what perhaps is of more importance to remember here, the still more inestimable privileges and blessings of the family altar and worship, and a Christian parental example.

This was Helen Dalton on her marriage day — pure as the falling flakes of snow, pure as any child, pure as any bride. The husband and she were affectionately fond of each other, and there was never, in the history of married, bridal life, a happier beginning. Such is the universal testimony in this case.

About the 20th or 25th of September she became, or knew herself to be, pregnant; the father of the child, beyond a particle of controversy, was her lawful husband. This was a month before she ever saw young Sumner, two months before that ride to Brighton or Watertown, previous to the outrage of Shawmut Avenue, where, if at all, they are to locate the crime.

It happened, in that pleasant waning summer and beginning of autumn, she was very much abroad. I hope I shall be excused for saying to the married men upon the jury, that the very restlessness of incipient pregnancy may have induced a desire to be abroad.

It was during this time that she made the acquaintance of young Sumner, whose name, from his connection with this case, recalls many sad thoughts and

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memories of the disappointed hopes that cluster about him and rest upon his grave. He was nothing more than a boy, with some capacity, I may say, for refinement of sentiment, a certain pleasing address and manner, with some susceptibility of disposition — not that he was debauched or dissolute — for his friends' sake I thank God there is not a particle of evidence that he was a seducer by profession or design, only that once or perhaps twice he was hurried away by impulse into the offer of a familiarity, revealing a warm sentiment, which was instantly repelled and instantly and forever abandoned. If evil into that immature nature came and went, as evil will, it perished in the blossom and bore no fruit.

Well, gentlemen, this acquaintance began the middle of October; I pray you to remember that there is not a scintilla of evidence that she ever saw him in her life until the middle of October. She was then pregnant by her husband six weeks. What the nature of their acquaintance was, so far as it consisted in visible evidence, I think we have been able to lay before you exactly. There were no walks by dusk or moonlight, no meetings by the insidious and seductive light and music of the house of pleasure, no walk, no meeting anywhere, on any occasion, alone, but a single ride on the 15th or 16th of November.

Gentlemen, this intimacy between Helen Dalton and Mr. Sumner, I look upon with abhorrence. I regard it exactly as Helen Dalton, in every word

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she uttered, in every line she wrote, whenever her bursting tears enabled her to speak her thoughts, shows that she regarded it. But we are here on a greater charge, a charge of adultery. I submit that Helen Dalton never came to love young Sumner with that impulsive, absorbing, engrossing love that endangers virtue and conquers shame. I submit also that there was never a moment, during their whole intercourse, when the thought of criminal connection was entertained by her for a moment. Young, comely, vain, trained to but little intercourse with the world, the society and pleasing manners of this young man tickled her and afforded her pleasure, but I maintain that her husband had her heart at first, and has it today; that this attachment (if you please to call it so) was merely a transient and superficial feeling, a false, fickle light on the surface of the stream whose depths were unchanged, untroubled, undisturbed.

I say also that it is beyond all reasonable controversy, that the very first time that Sumner suffered himself to be hurried away by a momentary impulse into expressions that revealed the existence of warmer desires, she instantly repelled them. Will you ever forget, gentlemen, that only a day or two before the Shawmut Avenue tragedy, having discovered by, it may be, a touch of the foot or of the hand, the existence of these warm emotions, she thereupon repelled him, snatched her letters from his hands, tore them up, and threw them out the window?

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Have you forgotten that one of the letters of Sumner to her was never opened by her, but found unopened?

And I submit to you also, gentlemen, that when at Brighton or at Watertown, he, probably for the first time in his life, distinctly conveyed an intimation of his wishes, how she started back from him, burst out crying — on the testimony of Mrs. E. O. Coburn, their witness, and to be believed by them — and commanded that he should instantly drive her home again to Boston.

The letters were found; the Shawmut Avenue tragedy was enacted; Sumner was brought into her presence and made certain statements. The next Sunday night she made a full and complete revelation of her way of life with Sumner, in the presence of her husband and of his family; admitted there, as everywhere, her own grief, shame and compunction for what had taken place, but protested her absolute innocence of the last and greatest crime, just as she had once before, when Dalton proposed that test, sunk down on her knees, with her hands on her father's gift, the Bible, and solemnly swore her innocence of that charge; just as she had, in that even more solemn moment when the pains of premature birth were upon her, in the presence of Mr. Richardson, adjured her Maker that she was innocent.

This brings me to that great fact which I apprehend you will believe to be decisive in the case, that the libellant, with the knowledge of every single credible fact and circumstance which is laid before

you in this cause; with a full and perfect knowledge of her intimacy with Sumner, her rides with him, her exchange of rings and letters, the gift of a book, and the knowledge of the still further fact that on one occasion Sumner, in a moment of passion, had reached his hand into her bosom; yet declared, not merely by his language, but by acts and conduct the most unequivocal, that he believed her innocent of that crime, and loved and trusted her still.

Dalton, who knew his wife so much better than we can know her, who knew how pure as an angel she came to his bed, who knew when she spoke the truth, who knew how tenderly she had loved him, who knew so much better than we can know how to probe her, how to surprise her into confession; he who had even a chance to watch over her sleep and hear the revelations of her dreams, still loved her and believed her innocent of this charge down to the 14th of January.

Once for all, gentlemen, remember that series of letters from the jail, so honorable to his first thoughts, showing him still so well worthy to be the husband of this wife; those letters from the jail, so beautiful, so manly, one long, unbroken strain of music, the burden of which is "home sweet home, and you, my loved one, my fond one, dearer and better for what has happened, you again to fill and illumine and bless it." So it stood down to the 14th of January, which brings us to a great epoch in the history of this case.

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The Grand Jury found no bill against Mr. Dalton and Mr. Coburn for murder, but indicted them for manslaughter. On the charge of murder they were released. They came abroad on the 14th of January, and then at once they were to prepare for their trial, which promised, at that time, to be a very severe one. The punishment for manslaughter may be twenty years in the State prison, and of manslaughter — both these parties were at that time believed by the public to be guilty.

To change that public opinion, and in order to a defense against the charge of manslaughter, it became necessary that there should be a belief, or at least an appearance of belief, in the guilt of Sumner. Therefore, gentlemen, at some time it was arranged, unquestionably through the influence of counsel, that when Dalton and Coburn should go abroad, they should not publicly meet their wives. To go into court and maintain that Sumner had attempted or committed adultery, and to maintain that in the sincere belief of his guilt they had killed him, and at the same time publicly consort with their wives, would seem inconsistent and impolitic; and so it was arranged — I do not know as I have to complain of it as an impolitic or inexpedient arrangement — that they should not meet their wives at all. Therefore it is that you hear from Mr. Richardson that Mr. Dalton wrote to him that, although he had arranged to meet his wife at once, it would not be expedient for him to meet her until after the trial;

otherwise he should be very glad to see her. They came abroad, and although in almost the very last letter which he wrote to his wife from the jail he expressed a desire to fly to her arms, he refused to see her, and did not see her at all.

So it remained down to the 25th of February. The very moment he places himself in this position, he comes to be in an antagonistic and false position towards her from the nature of the case; the habit of dwelling on the offenses or supposed offenses of Sumner very naturally brought his mind into something like suspicion or belief that Sumner was guilty, and that brought him to a willingness or necessity to believe that his wife was guilty, too. At all events, it brought him into a condition of complete perplexity of mind. Insidious enemies pretending to be friends, gossipers and scandal-mongers right and left, the whisper of public opinion to which Dalton is emphatically sensitive, the laugh of bystanders, all came around him as an atmosphere, and loaded his bosom with jealous doubts.

More strongly to bring to mind another illustration of the perplexed condition of his mind at that time, do you remember that Mr. Richardson testified that Mr. Dalton told him, with all the sincerity in the world, that his wife had actually confessed to him that she had committed adultery with Sumner in Fera's saloon? "I believe her innocent," he says, and then comes on the revulsion which is the natural result of the perplexed condition of his mind, and

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he says, "she confessed to me that she committed adultery in Fera's saloon."

Did she ever confess to adultery in Fera's saloon? You know well she never did. "When did she confess it?" "At the time of the flogging affair," and yet, after the flogging affair, he holds her to his heart and his bed for three weeks and writes her these tender and manly letters from jail. He understood exactly what she confessed then. She confessed then what she has everywhere confessed, by her words and letters, temptation, wrong, sin, but *no adultery*. Accordingly, gentlemen, he lived with her and wrote to her, and she was his wedded and trusted wife for a month afterwards; but now, in this perplexed and false position in which he stood towards her, preparing for his trial with ten thousand whisperers at his elbow, he actually brought himself to the belief that she had confessed it!

We come now to the 25th of February. What happened then, gentlemen? This wife had been kept from his sight from the time he left jail, on the 14th of January, down to the 25th of February. On that night, winged by that love which was stronger than the malignity of the Coburns, that love which is said to "laugh at locksmiths," she forced her way to his presence in the very house of her enemies, his enemies, and the enemies of truth.

Gentlemen, what took place there on that evening of the 25th of February can never, of course, be perfectly known until all secrets, large and small,

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shall be revealed; but I have no fear that, turning from the perjury of John H. Coburn, you will see that they met there after a long separation. The meeting, at the commencement, was most painful, beginning in a review of the past, interrupted, of course, by sobs and tears, in which she again reviewed and reiterated, and prayed him to forgive her for what she had done, the very same story she had told at the house of his mother the Sunday after the tragedy; and then and there, I respectfully submit, the husband trusted her again completely, as he had done from the beginning, and surrendered his heart and person to her; that they remained alone until some one rapping upon the outside reminded them of what they seemed to have forgotten, that the hours were flying by and that it was past nine o'clock.

Instead of meeting there to make arrangements for a separation of husband and wife, which is the theory of the other side, it was a still more sad and self-reproachful confession of all that she had ever done, asseverating and constantly avowing her innocence of guilt; and he, then and there, finding he had no criminal guilt to pardon, pardoned and forgave the rest, and they locked their door and sat down to sketch out the plan of their future troubled life.

Yes, the meeting was sorrowful at first; it was a review of the melancholy past; it was repentant of that past; it was the assertion of innocence; it was the belief of innocence; it was the arrangement of a future life, based upon that belief; and therefore

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it is that when she awakes the next morning, as she says in a letter to him, a new sun is shining, there is a new heaven and a new earth.

But what followed? He could not be publicly seen with her, and Edward O. Coburn went home with her that night, and Edward O. Coburn had discernment enough to find out that she had won her husband back again; and even he, although he is a man who will mutilate her letters and turn them by forgery as far as he can into a lie, even he was obliged to admit upon the stand that she told him that she felt better that night for she was going to see her husband again the next night. Then it was that the Coburns, finding that the husband and wife were going to come together again at last, and that all was likely to be over, then it was, I respectfully submit to you, that they fabricated and reported to Dalton this hideous and unutterable falsehood of the abortion by the instrument of Dr. Calkins. I submit to you, gentlemen, that then and there it was that they approached his abused and ready ear with the infamous story of falsehood and abortion.

The truth was this: Mrs. Dalton had suffered a premature birth. Grief and care which were entirely adequate to produce the effect, according to the testimony of the medical witnesses who have been upon the stand, had prematurely nipped in its bud of life her progeny. Three times, including the last one, she had been attacked by the pains of miscarriage, and three times that Christian matron

mother, when these attacks came on, herself familiar with that agony and pain, applied to her a mother's care and a mother's love, and along with these, those old mother remedies, warm water for the feet and composition powders; not to produce miscarriage, because that event was believed to be inevitable, but in the vain idea that they might a little relax the system and diminish the agony, and if miscarriage must happen, a little relieve the sufferings of her child. If for that this Christian mother is to stand condemned and judged as a party to the murder of that young life, God have mercy upon us!

The first two cases of this difficulty passed off. While she was suffering from the third attack, her brother-in-law broke in upon her and told her that her husband had refused to see her and to live with her, and then, after an agony of tears and another appeal to her Maker that she was innocent, the miscarriage took place. Then and there it was, gentlemen, that these men fabricated, out of whole cloth, the story of an intentional abortion. Dalton was again misled. It was thus that the last blow was struck and Dalton is, for the present at least, if not forever, separated from his wife. He is here with this suit. And the people are here, too, in large numbers to see whether justice is done. They have a right to be here.

Our liberties will last just as long as our trials are public, and not a moment longer. We get our love for a public trial from our ancestors. Who does not

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remember a remarkable case a few years ago, when her majesty the queen of England was arraigned before the House of Lords on a charge and assailed by a body of trash compared with which the evidence of Mrs. Coburn is as innocent as one of Dr. Watts' psalms. And here I would like to ask your honor and this public, whether or not, if it had been proposed to try that cause under lock and key at a long table covered with baize and by lamp light, the people of England would have borne it? No, they would have thrown every lord and bishop into the river, and piled the stones of the Parliament House on their heads; but they would have heard that trial.

Do you think that was for the love of offensive exhibitions, gentlemen? I have the honor to believe, for the country of my descent and yours, that was the old English love of fair play. They wanted to see how this was to be done, and how it was that a set of Italian villains that ought to have been hanged forty years before they came over to England to testify, were going to prove that the greatest of queens could become the wickedest of women.

And if John Coburn must separate this man and wife, people want to know how it is brought about, and surround the jury to see with their own eyes.

Shame to him who evil thinks! No man is hurt by this trial who was worth saving when he came into court. The man, the mind, the heart that could go through such cases as this, listen to this sad, melancholy story of bridal love, of jealousy, of misery, and

carry away no impression but of its obscenity, reminds one of an expression used by the pastor of one of your churches, who said he could go through a gallery of art, containing pictures of heroes and demigods, and come out with no impression but that they were all stark naked. Shame to him who evils thinks. Let us, gentlemen, not suffer our delicacy to prevent our doing our duty; the result is to be one which may interest the heart and affections and improve the life.

We begin this trial, gentlemen, by taking with us the presumption of innocence. We begin with the presumption that it is in the last degree improbable that a young bride, in the fifth month of her marriage and the second month of her pregnancy, affectionate, modest, of Christian training, has committed such a great crime.

It is the crime of adultery, Mr. Foreman. It is an intentional and deliberate surrender of the person unlawfully to another. No surprise at the window, no sudden placing of the hand within the bosom, instantly and by a flood of tears repelled, is adultery. There must be some intentional, intelligent, voluntary and consummated surrender of the body; and this established by evidence clear and undoubted, or there is no case.

No such case is established before you. Until you come down to the alleged confession as testified to by John Coburn, there is not a particle of proof, not one fact, not one declaration, that tends in the

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least degree to prove the guilt of the defendant; and of John H. Coburn's testimony I should say, it was the most barbarous, beastly, incredible, impossible perjury that was ever attempted to be passed upon a jury.

It is usual in cases of alleged adultery for the libellant, or the Commonwealth, or whoever has the burden of proof, to begin by what is called positive proof of what are called proximate acts; that is to say, direct, positive evidence of certain acts committed by which a party approximates to a surrender, evidencing an immediate commission of the crime. Direct evidence of the commission of adultery is of course very rare, and is never demanded. Positive evidence of these proximate acts, such I mean of course as the parties being found very near each other and apparently surprised, rising hastily, dress discomposed, confusion, hesitancy, embarrassment — positive evidence of that kind of proximate acts is ordinarily the evidence by which adultery is established in a court of law.

The first remark that I have to make here is, that there is not the first particle of evidence of any proximate act.

The burden being then upon the libellant to establish the fact of the adultery, and the libellant failing altogether to produce the ordinary evidence of a positive character of proximate acts, we pass on to see what is the nature of the proof relied upon by the libellant. And you see that it is circumstantial

evidence only of adultery. They rely wholly upon circumstantial evidence to prove the alleged fact of adultery. I speak of this intermediate and earlier period, let me say, in order that I may be perfectly appreciated by the jury, before and independent of the alleged offense sworn to by the Coburns, and I remind you that it is no more at the best than circumstantial evidence of adultery. I need not pause to remind you how much caution, how much candor, and how much intelligence are requisite in appreciating circumstantial evidence in any case. That kind of evidence may clearly prove guilt. Many times, however, it has also shed innocent blood, and many times it has stained a fair name.

There are two great rules by which circumstantial evidence is to be weighed, appreciated and applied by the jury. Those rules, gentlemen, are that the jury shall be satisfied beyond a reasonable doubt that the circumstances relied upon to prove the fact really existed; and then, that the jury shall be satisfied that they conduct, as a necessary result and conclusion, to the inference of guilt. It is a rule that may be called a golden rule in the examination and application of this kind of evidence which we call circumstantial, that should it so turn out that every fact and circumstance alleged and proved to exist is consistent on the one hand with the hypothesis of guilt, and on the other hand consistent, reasonably and fairly, with the hypothesis of innocence, then those circumstances prove nothing at all. Unless

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they go so far as to establish as a necessary conclusion this guilt which they are offered with a view to establish, they are utterly worthless and ineffectual for the investigation of truth. It is not enough that the circumstances relied upon are plainly and certainly proved. It is not enough to show that they are consistent with the hypothesis of guilt. They must also render the hypothesis of innocence inadmissible and impossible, unreasonable and absurd, or they have proved nothing at all.

I think I may very well put first, as the foremost fact and circumstance upon which they mean to rely, that Helen Dalton, having been conscious of the guilt of adultery, practiced by aid, assistance and advice of her mother, the crime of intentional abortion by the agency of Calkins' instrument, to conceal that guilt. That is the circumstance I have had the honor already to submit to you, by which they at last determined the yet undoubting mind and heart of Dalton. That was the capital suggestion by which they at last approached him, and persuaded him to abandon his wife and institute this libel. That circumstance is also the first and main one through which, from the first three days of this trial, they appeared to gain the ear of the public and the press, and by which they made an impression upon you.

I have the honor to insist upon the evidence, by leave of the court, that a more enormous and manifest falsehood, in the color of circumstantial

proof, was never laid before a jury. What is this circumstance, exactly as the libellant, by his testimony, brings it before you? We learn from the testimony that Helen Dalton, having been threatened with a natural miscarriage in the manner indicated in the evidence upon the stand by her mother, and corroborated more particularly by other testimony; having been threatened with a natural miscarriage once, twice, and a third time, was assisted by her mother by some of those feeble and accustomed old woman's remedies, warm water applied to the feet; composition powder to be taken.

It is not the charge, and I understand that the learned counsel will not venture to take the ground, if it be true in point of fact, as upon the evidence has been shown to you, that she was merely threatened with a natural miscarriage and in order to break its force, alleviate its pangs, and, if it was inevitable, abridge its duration, her mother applied the remedies; but the charge is this exactly: that, being perfectly well, liable to bear child whose countenance might tell the story of guilt, fearing the revelation of a natural birth, under the advice of her mother, attended by her mother and counselled by her father, she was conducted at first to an irregular operator who performed an artificial operation for abortion.

I ask, gentlemen, which theory it is that commends itself to you? Is it the one propounded by the respondent, proved by her mother, father, Mrs. Richardson, Margaret Ware, Mrs. Emerson, and

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Dr. Calkins, that it was a natural miscarriage, three times developing the threat of its approach, three times vainly sought to be alleviated by those trivial remedies of the mother, three times feared, three times provided against, and at last, happening under the anguish of the communication made to her by Dalton through Mrs. Richardson? Is it this, or is it, as they put forward: that, being perfectly well, pregnant, and about to be naturally delivered, but not knowing who was the father of the child, and fearing that its birth might reveal her guilt, for the purpose of concealment she resorted to this abortion? If it is the explanation which we lay before you, of course this is all perfectly worthless as circumstantial evidence in the case. But if, on the other hand, they have established their theory, these are circumstances of great strength.

I pray your attention, therefore, for a moment to the weight of the evidence. And the very first thing to which your attention is likely to be called, is the question: where was the motive which induced Helen Dalton or the mother of Helen Dalton to commit this crime of abortion? Where was the motive to stifle the birth of life of her unborn babe in the circumstances imputed in the libel?

My learned friend is very well aware of the importance of that part of the case, and therefore he made it substantially the groundwork of the case, saying that he would prove, by certain evidence more clearly to be brought before you, that Helen Dalton stated

that she could not tell who was the father of her child, and to secure herself from that shame, abortion was practiced upon her by the knowledge of some of her family and through the instrumentality of a low physician.

My learned brother put forward the motive and took the issue; but having gone through with the evidence in this part of the case, I ask you, where is the particle of evidence, credible or incredible, that Helen Dalton ever stated to any human being that she did not know who was the father of her child? From the first to the last, there is not a scintilla of evidence from any witness, even from the most disreputable and untrustworthy of them all, that Helen Dalton ever breathed a doubt to mortal man or woman of the paternity of her unborn babe. It was Dalton's child, by the testimony of all, that was to be made to be born before its time; and from the testimony of no one, in view of the evidence, light or dark, is there a suggestion that she ever feared in her life that it should prove otherwise. Where then, I ask you, does my learned brother find a warrant for that opening which made such a lodgment in your minds and in the minds of the community a fortnight ago, when this case commenced, the assertion that she said she did not know who was the father, and not knowing what father's face might be painted upon its infancy she decided to destroy it?

I remind you here that they have not produced one scrap of evidence that she ever saw the person

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of Sumner in her life before the middle of October. She bore in her bosom a pregnancy of a month, or at least of two or three weeks, before she ever saw him in her life. I contend that nobody's suspicions have ever dreamed that there was any colorable pretense for the charge of an unlawful connection with Sumner until the 16th of October, when certainly she was one or two months advanced in this pregnancy. There is no proof which they have been able to bring upon that point.

But I do not rest it upon the absence of evidence. How stands the matter, so far as regards the direct testimony? They have introduced two witnesses who certainly are entitled to credit: Miss Snow, a respectable young lady, and friend of Helen Dalton, and willing to be her friend and to avow herself to be her friend; and Mrs. Coburn, her sister, who would know, if any human being would know, the fact; and both declare that, to their best knowledge and belief, Helen Dalton never saw Sumner in her life up to the middle of October.

And now, turning again to my learned friend who says that she declared she did not know who was the father of her child, I ask him, as I asked before, where was the motive to stifle this unborn babe in the birth of life, and to add this crime of murder to all the other incidents with which this case is connected? Where was the motive? Do you think it probable, Mr. Foreman — I pray your attention to the evidence — do you think it probable that this young wife,

suspected by her husband and stricken to her heart because her husband suspected; who knew perfectly well that she was innocent; who hoped that it might live to be a tie and pledge to them in the days of their reunion; who knew perfectly well that she carried in her bosom, upon her infant's eloquent features, what might one day testify to the legitimacy of the child, the honor of the husband, and the virtue of the wife — do you believe that then and there she would surrender her body to this operation, to this peril, to stifle and destroy her means of proof; her most eloquent of advocates, the most powerful means by which a mother expecting and hoping for progeny could look forward to restore the alienated heart of a once loving husband, with whom she must either live or bear no life? I turn upon him, in total absence of proof of these alleged facts, and I ask what motive could she have had?

I appeal, to borrow the language of the Queen of France, when, in that great trial which terminated with the sacrifice of her life, being accused of everything else, she was accused of pandering the vices of her son, she exclaimed, and that shriek went through France and through Europe: "I appeal to mothers, if it be possible!"

If it were a mere question whether abortion was procured or not, I should leave it here; but inasmuch as, if it were not done, if that story is as false, every part of it, as any fabrication from the infernal world, this whole case goes down with it, I ask you to pause

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a moment longer. If there was no abortion, permit me to say, better were it for John H. Coburn, Edward O. Coburn, and Mary Hunter, if they from an untimely birth had never seen the light, than that they should come here and commit this great sin, if they die without repentance and without forgiveness. I submit that it will follow inevitably, in every aspect of this case, that if that story is untrue, there is not a particle of foundation to rest their case upon from the beginning.

I am not blaming Dalton. Do not understand me as blaming Dalton because he brings forward their charge of abortion. They vanquished him by it. They made a child of him by it. They made him believe the story. He took it as it was told to him, and it was no folly for him to lay it before you. It is they who fabricated it, and who by means of it have won him to this pursuit, who are deserving of our censure.

Now I ask you first and foremost, whether you believe our five positive witnesses? I would not in any ordinary case consume time upon it; but if you bear with me, I think there is a capital distinction between the testimony of the other side and that of these five witnesses, who swear to matters of fact within their own positive knowledge. If that matron mother led that blooming and innocent child across the street for the performance of this operation, she knows it. If Mr. Gove was consulted about it or counselled it either before he went West or after

his return, he knows it perfectly. If this happened at all, I submit to you that Dr. Calkins knows it perfectly. And yet they all declare it to be an absolute falsehood upon the stand.

We call Mrs. Gove who declares upon her solemn oath in your presence, that she never advised an operation, that she never suspected or dreamed that it was ever charged until a late period in the history of this case. You remember her testimony upon the stand, and I ask you whether you believe her a willful perjurer? Grief may have impaired her faculties to some extent. Her memory may be occasionally somewhat defective. Some exceptions may have been taken as to her manner upon the stand. But the solemnity and dignity of that Christian matron as a witness here must, I think, have given to you all the assurance you could desire that she meant to tell the truth. Is there any escape for her upon the ground of forgetfulness? Can it be that she could take part in such a transaction, and not be able to remember it? Could she have led her child to the knife, and carried her back to a premature delivery — and have forgotten it? Gentlemen, there is no such escape for my learned friend as this. There is the most dreadful perjury, or she has told the truth.

Permit me to say something of Mr. Gove. He stands before you convicted of a violation of truth and a most deliberate perjury, if he had any agency, direct or indirect, or if he ever suspected in his life that the crime of abortion was committed, until he

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heard it in the anonymous communication of which he has spoken.

I know very well that Mr. Gove's testimony is liable to criticism. With this burden upon his mind, and this long agony, I know how full his heart is. I know, gentlemen, that he does not dismiss it from his thoughts an hour; that it is in his prayers; that it goes with him to his bed; that it attends him in the streets; that it lies heavy upon his heart everywhere; that it makes him forget the proprieties of his general character; I know that it haunts his dreams — dreams, gentlemen; he has no sleep but the sleep which anodynes supply him; and I know very well that in regard to the trifling matters of detail, or concerning proprieties of conduct, Mr. Gove has not appeared advantageously. The father has been too strong for the citizen, in certain respects and to a certain extent; and I need not appeal to you, gentlemen, who may expect or fear also yourselves to be judged, to say whether or not he would commit a willful perjury upon a matter of fact like this.

Is not that a wholly delusive theory? May he not talk imprudently or even foolishly, but yet, past the middle of life, a man whose gray hairs give evidence of an approach to that time when we should be walking, thoughtful and silent, upon the solemn shore of that vast ocean upon whose waves we are to sail so soon, would he not put truth and good words on board?

Is that the correct inference, that a man like

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Mr. Gove, grown up before you, a boy from the country, of respectable and pious parentage, one of the disciples and children of John and Charles Wesley, who sings their hymns, utters their prayers daily and nightly, comes to swear deliberately and willfully to a falsehood? God forbid, gentlemen, that we should thus judge one another in judgment!

I do not appeal to your charity, but I put it to your knowledge of life, whether you cannot appreciate how the father should be talkative, and forward, and imprudent; willing to forget, or at any rate forgetful of smaller and minute details, and yet shrink back as if hell opened under his feet from the utterance of a lie?

There is another single witness who must have known, if anybody knew, whether this charge was true or false, and that is Dr. Calkins. We who did not know who he was, or care what he was, produced him here, because we knew that whoever or whatever he was, he would not dare to stand before the face of that mother and child, and tell you that that mother ever practiced abortion or assisted in it. We called him and placed him before you, and you know that, unless he adds to the other black list the guilt of perjury, the charge is groundless. As Dr. Calkins is a stranger, he was entitled to be heard before you, and I submit to you that he is entitled to be believed upon his oath, upon every principle of law and common sense, until it is shown why he should not be believed.

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I ask you, if there is any evidence that should warrant you upon your oaths in saying that Dr. Calkins has sworn to a word of untruth? My learned brother addressed certain inquiries to ascertain whether he had not at some other period procured an irregular abortion. Dr. Calkins took his constitutional privilege and declined to answer. What is the inference? It is that he so respects his oath, that he dares not answer untruly, and that he could not answer untruly, without criminating himself, and, therefore, he took his constitutional privileges and declined to answer. What was to hinder him from denying everything, but the fear of Almighty God on the oath he had taken? And why does he stand here and swear that he did not practice an abortion upon Helen, but because he can truly do it?

I submit to you, that the very fact that he made this distinction, that he claimed this constitutional privilege in the one instance, and answered freely in the other instance, showed that he could negative one inquiry as a man of conscience under oath, and respected his oath too much to negative the other. Although I disapprove of what we may conjecture his practice to have been, I thank God that herein we may see another illustration that a man may do one wrong and yet not do another. I beg to submit also that there is not a scrap of evidence in here that Dr. Calkins has ever taken an infant's life, or endangered a human mother.

Three witnesses, then, the only ones who have

spoken upon the subject, declare this charge of abortion against Helen Dalton to be false.

What becomes of this theory of abortion upon the other side? The story is that, being well enough, feeling herself pregnant, and not knowing who was the father of the child, she decided to submit to this operation, and put it to death. And upon this view of the case, this whole operation should be conducted secretly and without the knowledge of her husband; whereas we see by his letters, she apprised him from attack to attack, exactly or substantially what was the matter, exactly or substantially what they all feared, exactly or substantially what her mother was giving in order to alleviate her pains if the miscarriage was to happen, and after all, she congratulates herself, congratulates Dalton, that she will give him a child at last, and moots the little playful conjugal question, "Shall it be a boy or girl?"

What do they go to next? It is said — and this brings me to an interesting and very important part of the case — that there was an intimacy between Helen and Sumner: walks, drives, rings exchanged, a book given, a light, frivolous, objectionable intimacy; and so there was.

I insist however, gentlemen, that this intimacy which, since the days of Joseph Addison, has been called a flirtation — a vulgar, coarse word, but one that best expresses the idea — as circumstantial evidence to prove the fact of adultery is wholly worthless; and for this decisive reason — founded

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upon the nature of circumstantial evidence — that it may perfectly well consist with innocence of that great crime even though it may not consist with propriety, with decorum, or with a proper regard to reputation.

I have the honor to submit to you that there is no fact in all our social life better established than this: that a young married woman may admit that kind of intimacy and accept a certain degree of pleasure from it, and yet at heart never be touched for an instant by the sentiment of a dangerous love, and start back when the proposition of crime is intelligibly made to her, as if hell was opening under her feet.

I submit as the result of all our observation of life and of books — our Edgeworths, our Walter Scotts — all that we have observed everywhere, proceeds upon this distinction and reasons upon it; every observer puts the flirt in one class and the adulterer in another, and everybody understands that they belong to entirely different species of characters.

We ridicule and satirize her whom we call vain, light, coquettish; from the adulteress we turn away with aversion and tears. We satirize one as foolish, and turn from the other as wicked. We hold up one as a warning to herself for her own correction; of the other we say: "Oh no, we never mention her." One has a right, I submit to you, gentlemen, to the benefit of the exhortation of parents, the protection of law, the protection of public opinion, the care of

husband; from the other, duty, public opinion, religion itself commands us to turn away and to tear her from the heart, although its fibers part and its blood follows in the effort.

Is it not a fact, gentlemen, and perfectly well known to us all through our observation of life, that a woman, married woman, may hover and flutter for half a lifetime in this region of vanity, flattery, and coquetry, and yet never dream of taking the dark descent below? How many of them will flutter their plumage and incline their ear to the music of flattery and even allow it to be polluted by the whisper of a half-suppressed warmer passion, and yet, when the romance is broken by the solicitation of chastity, will start and put their hands upon their ears, and fly as if a goblin damned was revealed before them!

I ask you if you believe it probable that a young wife, eighteen years of age, in the fifth month of her marriage and the second month of her pregnancy, modest to an extraordinary degree, as her husband attests, a child of schools, a child of religion, has all at once committed this great crime? If a writer of romance should put forward such a case, would you not say he did not understand his own foolish business and that his case was extraordinary and unnatural? Do you believe it probable, do you believe it credible, that those instincts of shame, those lessons of virtue, those lessons of childhood, those words of the holy man by whom they had just

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been united in marriage, those prayers, those hymns, those hopes, were all lost in a moment?

I admit, gentlemen, not very much accustomed to this kind of society, probably never in her life having received the attention and address of a young man like this, she very naturally felt a certain degree of pleasure in it — that kind of pleasure that applies to the head, but to which the heart which is wise replies: Can this be joy?

But the instant she saw it was not her beauty, or her conversation, or her manners that made the attraction, but that the aims were lust, she resisted and fled. If then, gentlemen, I am warranted in my position that this series of conduct which we call a flirtation is not circumstantial evidence of guilt at all, this case presents the strongest possible illustration of that fact.

It will not be enough for my learned brother, when he comes to comment upon the circumstantial evidence in this case, to say that the facts are always and throughout consistent with the supposition of the crime of adultery. Unless he can go further and show that they necessarily lead to that conclusion, and that they are utterly irreconcilable with the hypothesis of innocence, they are worth nothing for any purpose.

If you take the defendant's life from January down to the last period to which the evidence in the case has traced it, it is perfectly manifest that the general and habitual tone of her sentiment, of her

affection, was steadfastly for her husband, that she loved him affectionately, deeply, constantly and always, and although she might have been a little influenced, her love a little suspended by this intimacy, which she and all of us so greatly regret, yet it revived again in all its original strength, the moment the sharp realities of life brought her back again completely to herself. And I shall respectfully submit, in the next place, that whatever your opinion may be as to the extent to which this intimacy with Sumner had proceeded, and how far her interest in him had been carried, it is perfectly plain, on the evidence introduced by the libellant himself, that it stopped wholly short of the commission of the last great offense.

I suppose my learned friend's argument will be upon this point, to bring in his ecclesiastical law books to prove that they have somewhere broached the doctrine, that if there is proved to have been unlawful love and opportunity, the jury may infer the crime. I ask your Honor to instruct the jury that whatever such authority may be quoted, we have no such law as that in this Commonwealth. I claim that we are not bound by it, whatever those works may declare. They seem to be of the opinion that where there is unlawful love and an opportunity, adultery is necessary as a sort of chemical result. Do they forget that there is such a thing as free will, such a thing as conscience, such a thing as recollection of the teachings of religion, such a thing as shame,

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such a thing as a point at which to stop and a point from which to go back? They forget the inherent virtue that pervades the nature of woman. I say that the doctrine is old, poor, monkish, artificial, and has never been adopted in this State, and never, as my learned brother will present it to you, in any country.

They have endeavored to show that Helen Dalton was heard to tell Mr. Dalton that he was no husband of hers and expressing a wish as to his death.

My friend is welcome to the evidence, if he will only quote it correctly and will make the proper use of it. The evidence is that she was begging him not to go, presenting to him every inducement not to go, and even adding in the language of frantic and imprudent imprecation: "I hope you will get killed if you go; for God's sake stay with me; stay with me or you are no husband."

Is it not a fine touch of human nature in the heart? I submit it to my learned friend and pray his commentary upon it. And inasmuch as he meets my explanation with a smile, may I be permitted to ask him if it has not been regarded a fine touch and true to nature in the Roman poet when he drew the Carthaginian queen; when she had been driven even to unsex herself in entreating Aeneas to remain, and appealed to the memory of that secret meeting in the cave during the storm, when she entreated him by his offspring unborn and by the future of Carthage to stay; and then, when she found him still fixed and

determined upon his departure, breaking out before the tempest of her passion and praying that he might perish by the storm and the whirlwind and the flood, without the care of friends or gods, upon the angry sea; and again, when another reaction came, falling back fainting, and carried by her servants to her couch!

I have respectfully submitted to you that the affection of Mrs. Dalton for Sumner was a light, transient, superficial fancy, and no more; for the very instant she discovered that his designs went further than her virtue and her instincts approved, they were met and repelled. If that be the result of the evidence, of course all this part of the case is at an end. But I am only too happy to call to your remembrance, that in regard to the whole body of evidence which is laid before you, if you take her entire life as it is brought before you from January, 1855, when their courtship began, until her very last letter in answer to his libel, which terminates the series, you will find it marked by a sweet, passionate and beautiful love for her husband, one long, true, constant love, never interrupted, never displaced; once losing somewhat of its entire control, but recovering it again in a moment and flowing strongly and beautifully as ever.

She was a child at school when Dalton sought her honorably in marriage. There is no doubt, for Dalton feelingly and strongly so declared, and I think we had other testimony to the same effect,

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that she was modest, uncommonly so, and to such an extent that, although he met her often, he sought in vain to catch her eye in the street as she walked to and from school. It was only when addressed honorably and openly for marriage, that she yielded him her heart. I submit that it is perfectly clear that Dalton had secured that great thing, a pure and modest young woman's first love.

Look at her after life, trace it from the hour of marriage, and you find a uniform concurrence of the evidence in every quarter that she was ever affectionate and fond; that she made his house and his home a paradise. We have the universal testimony uncontradicted of everybody, everywhere, that she was ever affectionate, ever fond, never away for a moment when she might hope to have the pleasure of his society there, never absent from a meal, never neglecting a solitary duty of the wife, but always faithful, always affectionate, always tender.

It will add much to a correct understanding of this part of the case to read Dalton's letters to her from the jail, to see whether he then had anywhere any reason to remind her that she was during those few weeks becoming absent-minded, engrossed, or irritable, or that she was at all changed. Not a word of it. There is not a little of evidence to show it, but everything on the contrary demonstrates that every moment of time which she could find she devoted to her husband, that all that time she appeared the same, and manifested that unchanged and

affectionate tenderness and care; that she was never moody, never gloomy, never apparently sorry to see him; never neglectful of the ten thousand little cares through which the demonstration of love exercises and enjoys itself; never absenting herself, but always there, always there through it all.

I confess that I attach an importance to all this beyond my own power of language to tell or convey to you, because I put it to your own hearts and your own knowledge of life, if her heart had not been his, would she not have changed during those five or six weeks in her husband's eye? Could she love God and Mammon? Could her heart own two loves at once? No, gentlemen; she would have been changed, she would have been away at his meals, inattentive to his wants, unmoved and unregardful of his care — a changed wife in all. But what is the fact? I submit that it stands entirely demonstrated here, through that whole critical period, upon the testimony of her husband himself, again and again most fully and unequivocally delivered in his letters from the jail, that she was not changed to him for one hour. This all follows close upon the affairs of the Shawmut Avenue tragedy; and I entreat your attention that there was no mourning, no tear over Sumner's untimely grave. Was there anything in the three weeks following to show that she did not through all this cling to her old love exactly as before? Did not her husband leave her every morning with a kiss, take her upon his knee, find her there every

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evening when he came home? A striking evidence of how affectionate was their intercourse is found in the fact that when Mr. Gove, hearing the rumor of this scandal and this misery while in the West, coming home distracted and anxious to see what it was that was threatened, is greeted on his return by that first sight which he sees — the wife sitting still upon her husband's knee.

And thus those three weeks passed away. And when once he left her upon a certain Friday, we have the testimony of Mrs. Richardson how distracted she was during that absence, how she wandered almost at midnight to her mother's house to seek an explanation, and to complain and cry out that the Daltons were getting away her husband from her.

And then, when she goes to the jail, she is like a light there, giving him every possible provision which she could afford, asking him to have his clothes returned, bringing him bouquets to give him pleasure in his cell — pansies "for remembrance," as poor Ophelia says — every hour, every moment, down to the very last when he goes from the jail and declines to meet her.

I take that whole life together, that little rounded life from January, 1855 to January, 1856, and I say that there is not in the history of womanhood, a history of married life, a year more beautiful, true, constant. I ask you, is not a love like this worth having? Is it not the evidence of a good heart, a

rich heart, a wealth for him who knows how to cultivate it?

I call your attention particularly to one or two of these last letters of Dalton from the jail. If he, upon all this evidence, believed her to be innocent of adultery, can he stand before the jury today and ask you upon the very same evidence to believe her guilty? Is not he of all human beings the best qualified to judge of the evidence and to judge of its effect? In the first place you will say, Dalton had heard every word of this evidence, and if it really and necessarily conducts us to an inference of guilt, it must come to us exaggerated. Was not the husband's ear quick to hear, and the husband's eye quick to see? Would he not know if she had said that which was to strike a dagger into his heart? Did not he hear it, if she ever exclaimed: I love Sumner?

Dalton of all human beings had the best means of judging of the guilt or innocence of his wife, and I submit that his judgment should be conclusive upon ours. Was not the husband, under the nature of the circumstances, the best and the severest of judges? Had not jealousy quickened his apprehension, and even colored his eye against her? Had he not beaten Sumner almost to death for improper familiarities tendered by him and not with sufficient promptness repelled by her? Was he not jealous and suspicious, and therefore exactly in the mood to look upon her with more distrust than your hearts would allow you to entertain? And when he came to probe the

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whole matter to the bottom, what human being so well as Dalton is entitled to belief? When he looks back and sees that modest eye averted in the street, that coy reluctance to yield her virgin heart, that sweet chastity of her original virgin person, who could know as well as he how truly she had loved him always? Who could know as he must have known how to catch her in a lie, how to probe her for the truth, how to come suddenly upon her, how to practice a little deception and take her unawares, how to hang upon her sleep and see what she said when conversing only with her heart and her spirit, without the assistance of her reason and her judgment? Who could tell so well as he how sincere was her repentance and how that repentance was confined to a mere acknowledgment of imprudence, joined with a protestation of innocence?

Who could read that heart, who try that case, like Dalton? I hope I do not underrate the intelligence of the jury, upon whose intelligence so much is depending; I do not fear the action of the tribunal which for her I have invoked; but, with the profoundest respect for you, gentlemen of the jury, and for the court, I ask what one human being could best investigate the facts and most surely know how to interpret them, could most certainly draw the right deductions from this whole body of circumstances, if it were not he whom jealousy had exasperated and aroused? He has judged, and he has found her not guilty.

What changed Dalton when he came out of the jail? It was the necessity of his unhappy position. He was on trial for manslaughter, and the penalty threatened to be a severe one. It was necessary that they should be separated; and when they were separated, he fell a victim to the influences which were brought inevitably to bear upon him. You remember the passage in one of his letters, date of December 19th, in which he says: "My dear wife: If the world could understand your case as I do, I should feel happy; but as they do not, we must make the best of it."

There it is. There is his judgment: for myself I have tried you; for myself I approve you; you gave me your virgin heart and person; you should make me the father of my first child; I have appreciated your error; I have investigated its origin, the extent to which it was carried, and I find you the same dear Nellie that won my heart, and would to God that the judgment of the world was as my judgment, would to God that the opinions of the world would enable me to stand and avow publicly what I assure you is the settled conviction of my heart and judgment.

We have arrived in the course of the argument, gentlemen, to the evening of the 25th of February. The case of the libellant, if it can be maintained at all, is to be maintained on this: that although down to that night the respondent had continued constant in her asseveration of innocence of the great crime,

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and her husband had implicitly believed it, on that night, not having succeeded in forcing an interview with him at the house of Coburn, she confesses to him that she had been guilty of adultery. Unless this part of the case is established by credible and undoubted testimony to your reasonable conviction, it is certain that there is no case for the libellant. We are brought at once, then, to the examination of that important part of the case.

Perhaps I cannot better begin what I have to say in relation to it, than by asking you whether it is at all conceivable, as a matter of probability, that this respondent on that night all at once falls into a confession of guilt? Down to that hour, remember, her story had been uniform, and repeated, and constant; down to that hour, on her oath, in the pangs of premature childbirth, with tears and attestations to God Almighty she had declared herself innocent; down to that time her husband had a hundred times said he had believed her to be so. And the allegation on the part of the libellant is, that then and there, under the influence of some incomprehensible motive or another, she suddenly and instantly changes her tone and admits her guilt.

I ask you, gentlemen, with every great earnestness and confidence, if you can discover a motive for it?

For what purpose is it on the confession of everybody in this case, that she seeks this interview with her husband? Everybody tells you — John H. Coburn tells you — that in that interview she proposes

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to fly with him to California, where they can live away and alone. Every particle of evidence in this case, entitled or not entitled to confidence, makes it perfectly clear to a demonstration, that she solicited that interview because, tortured by his absenting himself from her since he left jail, she was anxious to make one more effort to win him back.

From the hour he left the prison, down to the night of the 25th of February, she had expected to see him; down to that time she had been kept from him by influences incomprehensible to herself; down to that time she felt scandal and slander were keeping them apart; that his ear had been abused, and that he only wanted one more assurance from her lips that she had told all the truth, and he would come back to her.

For that purpose, the result of all the evidence in this case proves, she seeks him, and then and there — I respectfully submit to you in advance — that it is a stupendous moral improbability, which nothing can sustain, that on any possible theory of this case, she would meet him and fall into a confession of adultery.

For what conceivable purpose, I ask you again, on any theory of the case, should she do it? She was dying to live with him; her heart craved him; she must live there or bear no life, and the whole object of the interview, obtained partially, they say, by stratagem — and I dare say it is so, for they did not intend to meet — was to remove any lingering

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doubt or uncertainty on his mind in regard to her supposed guilt. The very object of it was to overcome any obstacle that scandal and slander had placed between their reunion, and therefore I submit it is provable by no amount of evidence, that meeting him for that purpose, she falls instantly into a confession of guilt. Whether she was guilty or innocent, I submit to you, we know, as men of common intelligence, that she would have continued, then and there, steadfast in her assertion of innocence.

Was she so great a fool as to think for a moment, that if after so many and such solemn asseverations of her innocence she could not win her husband back, a little confession of adultery would do it? If he would not live with her an innocent woman, would he live with her a guilty woman? I put it to you in advance, gentlemen, that if an angel should appear before you with such a story as this, it would bring his origin, mission and character into great question with you.

I wish to say a word just here in regard to the nature and danger of this kind of evidence on which they are now relying. It is the evidence of confession, and confessions on the reported words of the speaker. The evidence of confession may sometimes be the highest and most satisfactory in a judicial investigation; and, on the other hand, it may be, according to the circumstances of the case, the most worthless by which human rights are ever brought in peril in a court of law.

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Gentlemen, if we can feel undoubted confidence that the exact words of the speaker are brought before us as they were uttered; if we can feel undoubted confidence that we have them all in their proper order and according to their sense and meaning as they were spoken; if we can feel undoubted confidence that nothing has been omitted, nothing has been colored, the right collocation has been pursued from first to last, and that the true substantial sense and effect, as it was intended when they were uttered, has been given, we may then, with great confidence and certainty, proceed to the most solemn of adjudications.

But if, on the other hand, there is reason to fear that the words themselves may have been imperfectly heard; if they come reported to us by untrustworthy and unreliable witnesses; if they are testified to by persons under strong temptation to color, to exaggerate, to forget, to drop the appropriate qualifications, to change the order of them as they are spoken; if they come before us under such circumstances as these, gentlemen, there is no weaker or more worthless or more pernicious description of proof on which an intelligent jury can be called upon to investigate a case.

Let me remind you that every one of these alleged confessions is made by a party believing and admitting herself to be guilty of something; by a party who, under that consciousness of having been guilty to some extent, through sighs and bursting tears

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makes confession of that guilt, intending to make no confession of guilt beyond that. Is there not extreme danger that the extent and nature of the confession which is insisted upon will be exaggerated and colored when it comes to be reported to you by parties with a disposition and temper to report unfavorably?

Helen Dalton did not stand in a position in which she could deny all impropriety and all guilt; on the contrary, her case is — and it has this affecting and this important peculiarity — that she had much wrong to confess, that she had much guilt to own, that she had many temptations to acknowledge, that she had much sin to pray God and her husband to forgive; therefore, when she is making confessions to this extent, is there not danger the most extreme, unless we can place the most undoubted reliance on the kind of testimony and the character of witnesses by whom it comes to be reported to us, that it will come exaggerated and misconceived and overrated, perilously and fatally, at the cost of truth?

I also call your attention here to that great rule by which any evidence of confession is to be judged, which is, that if the language employed, whether spoken or written, is fairly and reasonably susceptible of a twofold construction, it is the duty of the jury to take it in the milder. It is not at all a matter of feeling; it is not a matter of the heart; it is not a matter of charity; it is not a matter of inclination, but it is a clear rule of the law, that where the language is equivocal, and where circumstances (and her

own folly among the rest) have placed the party in a condition in which she must speak in equivocal expression, you are bound everywhere to adopt the milder interpretation; and yet you see that when testimony like that, not resting upon letters, comes to be reported to you by witnesses under strong bias and feeling it is all but impossible that it should not come before you in form false and distorted.

The law makes it necessary, I submit, and I pray the observation of the court upon this almost indispensable prerequisite, that confessions, to be given credit, should come before you through a source perfectly trustworthy; through witnesses whose character is undoubted and justly unsuspected by the jury, so that they should feel satisfied that they cannot by any possibility have lost or gained by their representation before you.

And I submit that there is not a scintilla of testimony of confession against Helen Dalton, but of the confession of that indiscretion about which there is no controversy in the case, except from witnesses who are not apparently entitled to the least degree of regard from the jury.

John H. Coburn, who admits here in this case that he attempted to obtain money by written false pretenses of Mr. Gove, an offense that ought to destroy his testimony in a moment; Edward O. Coburn, who has to admit in the outset of the cause that he is a robber to the amount of seventeen hundred dollars of his father's money; and Mary Hunter,

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that brawny stranger of whom we know that she is a mother without a husband — these are the witnesses who come before you.

These witnesses to confession cannot so much as bring a letter of my client to this case without mutilating it as a forger; they cannot carry a letter to her husband without taking a pen and striking out eleven lines of it, and thus changing the whole statement into a lie which she has never uttered. Was not his Honor, a week or a fortnight ago, obliged by the undoubted rules of law to reject a letter offered in evidence by the counsel on the other side, because it appeared on the evidence addressed to the court, that one of the leading witnesses had by mutilation turned the whole letter into a falsehood, and poisoned her own proofs at the very source? Are they witnesses to remember words where everything may depend upon the exact expression, upon the order of language, upon dropping an epithet here and inserting an epithet there, by which the guilt of adultery is confessed? Is this a body of witnesses that are to be trusted to report words that are the issues of life with certainty and accuracy? Shall they count the pulses of human life?

But, gentlemen, we must go now into this miserable detail a little more fully. My client has been in great danger of being ruined by the evidence of witnesses every one of whom I submit is worse than the other, and every one of whom is less trustworthy than the other. And it becomes, therefore, my

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painful duty to ask your attention for a few moments on the evidence to some of these grounds on which the law declares it to be your duty to lay the evidence aside.

I begin with the foundation witness in this case, John H. Coburn, and I respectfully submit to you, that, tried by every test of credibility which the law recognizes, on your oaths you are bound to disbelieve him. It is not that a laugh can be raised against Coburn or his testimony — that is nothing; it is that, according to those tests which are founded on the longest and widest experience the law deems satisfactory to show whether a jury can carefully believe or not, *he is not to be believed*.

I submit, then, that John H. Coburn is not an honest man, and is not, therefore, entitled to be heard in so delicate a work as bringing every word my client spoke on that evening to her husband; he is not an honest man, and I put it on your solemn oaths to you, that there is not a man on that jury who, on the exhibition of John H. Coburn, would entrust him to carry a bundle worth five dollars from this courthouse to the depot. There is not a man of you who would take him into your service; there is not a man of you who would have his own life, his own character, his own good name, still less the life of his child or the good name of his child, to rest on the tongue of that witness for a moment.

How does he come into this transaction at all? I will tell you exactly. He found out very well that

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Mr. Gove was extremely exercised on the subject of this attack upon his daughter; he found that this father, alarmed and apprehensive, receiving anonymous letters, his nights made sleepless, his fears becoming his master, was looking for and fearing evidence in every direction; and says Coburn to himself: "I will have something of this; I will make something out of that, or my name's not John H. Coburn." Here he found the tenderest sensibilities of the human heart tortured.

I will not call, as my learned friend did the other day, Mr. Gove an "old fool," but he was an old parent tormented by his heart's love, ready in a moment to believe everything, to run to the fortune teller, ready to take counsel with dreams when his anodyne would give him a dream to consult. And says Coburn: "I will have a jacket and trousers out of this business; I see pantaloons there; I will have a game of billiards and suit of clothes, or I am nobody." That is the way he comes into the case. He comes and tells Mr. Gove the most treacherous, beastly falsehood by which an exercised and tender and apprehensive heart and imagination can be solicited and imposed upon. Says he: "I was in the courthouse the other day, very much absorbed in the trial of the cause, and somebody whispered in my ear that one John Simpson saw these people commit adultery out in Brighton." "Now," says he, "I don't think John Simpson will stick to that; I don't know that it is true, but if you will furnish me money enough

I will go and find John Simpson and he can be brought to see whether it is true or not."

Every word of that was as black a lie as if it had been uttered by four pirates. He never had heard a word in the courthouse about John Simpson; there was no such man as John Simpson; the whole is a pure and sheer coinage of his own heart to practice upon this father and furnish himself with the miserable means of a night or two's dissipation in Providence, and a suit of clothes that he had not credit for at a second-hand shop. It is a sheer fabrication — there is no such man as John Simpson on the face of the earth; if there is, now is his time, now is his last time; I call for John Simpson, out of this court or out of this community, to show his head; aye, or any human being that ever heard of him in his life.

I hope the solemnity of an oath will never be dispensed with. I believe it is not likely to be; but I am bound to regard it as a foolish and idle ceremony if it is taken by a heart and head that does not recognize out of doors the principle of truth. I say once more, that you have no more evidence of the existence of John Simpson than you have that Coburn met him at Providence. He lied then for money; he may now lie for malignity and consistency. There is not, therefore, a title of evidence, and I call on you who are charged with the administration of justice in this case, who should know by this time that our rights are only as our proofs — and that you don't own your house any more than I own it but upon evidence —

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that you have no right to your life or good name, no right to entertain a belief in the good name of your wife or child in law, but according to the proofs by which the law is administered — I call upon you here and now to say, this man is a rogue, a liar, a forger of false telegraphic communications.

Do you suppose that anybody whispered to him in the courthouse about John Simpson? Next to John Simpson, I should like to see the man who made the whispered communication in the courthouse. Coburn hadn't the curiosity to look over his shoulder, so absorbed was he in the proceedings. Somebody whispered in his ear, "Simpson saw all this at Brighton," and he never looked over his shoulder to see who it was. If the person who gave that information is within the sound of my voice today, let me tell him now is his time, and that he would bring a hundred times more than he was probably ever worth in his life if he would show his head.

I wish to avoid all mere professional raillery at the witness. I am bringing him up to the golden tests and standards by which the law weighs proof, or the assayer weighs gold. I am helping you to see him by the light of the rule of law, and I cannot allow you for a moment to suppose that I am indulging in a professional habit of abusing witnesses when I am simply declaring to you — with all truth and soberness, under my responsibility to my profession and my oath of office, and with the sanction of this bench — the great rule of law by which the credi-

bility of evidence is to be passed on; and I declare the law to be that if you find a witness to have sworn deliberately to a falsehood, knowing and believing it to be a falsehood, he is no longer a witness, and on this ground I submit that the testimony of John H. Coburn as to the alleged confession is not to engage your attention for a moment.

I ask you to look at the conduct of Dalton; take the unquestionable circumstances, then all the positive testimony; take the beautiful letter in which the next morning Helen Dalton breathed out her expectation of that new life of promise resulting from the interview, and I ask if you believe for one single moment that such a hideous communication was made?

Remember that down to that time, even after Dalton left the jail, he declared that he believed she was innocent, that he loved and trusted her, and wished to God that he could trust her completely. Remember that down to that night, on her oath with her hand on the Bible, and in the pains of threatened miscarriage, she had declared herself innocent; and remember that she then comes into his presence to play her last card for his heart, and then, according to this man's testimony, makes such a confession. I put it to you that, exasperated as Dalton was, hoping yet fearing, manifestly determined to fly at once if the evidence of her guilt should come from her lips, would he not have started from his feet at such a declaration, and cried "Oh! ruin! ruin!" and fled from the door?

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You are soon to be appealed to to give a divorce,¹ because those sensibilities which are respected and which are to be religiously cared for — these susceptibilities of the husband have been outraged.

Try him, then, as a husband; try him on the supposition that he has those sensibilities and feels them keenly, and then give him credit for this character.

I have to ask you, if one man of you doubts that on hearing such a communication from his wife he would have exclaimed: "God forgive you; I cannot! All is over now!"

By all the admitted testimony of this case coming to us by the witnesses for the libellant, and therefore open to no criticism from them, the doors are softly drawn to and locked, and there they are for two hours and a half — there they would have been till daylight if this same John H. Coburn had not knocked at the door and said it was nine o'clock, and asked them if they were aware of the lateness of the hour. What was he doing there? How is the confession just then made for the first time?

I submit that the conversation began with the door open, and was the free, full, heart-breaking revelation of actual wrong, and an asseveration of actual innocence; that it was full of sorrow, grief, and earnest pathos on her part; that she at last caused him to believe the truth, and then the door was closed, and then and there she gave her love to her husband. I have adverted to this more than once. You may take it as coming from my client, or on my sug-

gestion, as you please. In that sweet recognition they spent two hours and a half. He was satisfied that there had been nothing but imprudence, and no guilt; and in that sweet moment of reconciliation, after an absence of two months — do not be quite sure that he did not then and there give her all that a husband can.

I go further, and show you, by a body of positive and circumstantial evidence, that they there made a provisional arrangement for their troubled and yet possible future. They fell into an arrangement, and although he could not live with her openly until the sentence was imposed, yet he was entirely ready to do everything for his wife, and then and there commenced arrangement for their troubled future; and I submit it to you, it was agreed that they should meet the next Thursday night to mature their arrangements, when they should lay out a scheme of life for the future.

I put it to you, gentlemen, with great earnestness, that if the testimony of Edward O. Coburn was entirely trustworthy, making a reasonable allowance for the difficulty of reporting language, the state of the case which he makes out against her is no more than can be made out against any young daughter of Boston, pure as the flakes of snow when it falls, standing at the Athenaeum looking out upon a graveyard, upon whom an intoxicated rowdy should suddenly break in and allow his hand to stray lasciviously upon her bosom, from whom instantly she

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turns, shrieks, bursts into tears and falls hysterically — not a particle, and that is the state of testimony before you.

Of the two Coburns at confession give me John H. Coburn, for he gets up something which nobody believes. The principles of the two Coburns remind me of Pope's classification:

"John struts, a perjurer, open, bold and brave,
Ned sneaks, a liar, an exceeding knave."

There is a general public rumor current in this community that a thief is not an honest man, and Edward O. Coburn is a thief. He was obliged to admit under your eye, that he took false or true keys, broke into his father's safe, and took all there was. Of the amount he was not certain, but it was about \$1,700. You heard the explanation that he attempted to give here, and the malignity and intellectual hypocrisy by which that explanation was marked. He was called upon to admit the fact, and he did so. He was called upon for his reasons, and he said that in consequence of his irregularities he had contracted debts, which he wanted to pay. He wanted a little money and as some defense against this charge he said it was under the influence of certain wild ideas; that the memory of this affair had done him great injury. When he was asked how much money he wanted to pay his debts, he said he did not know, but he took all there was; and then he went away and denied that he had taken a dollar.

And yet to put himself upon this jury — I care

nothing about his defense — as entitled to some confidence from the jury, he undertakes to account for taking this money by certain wild ideas. How contemptible a hypocrisy is this!

I can very well understand, from what I have read and what I have discovered, that a husband, suddenly made aware or made to believe in his wife's guilt and made jealous by it, might be urged in the tempest to the murder of the adulterer, or to the murder of the adulteress, and the digging of his own grave. That I can understand, but it is altogether a new mode which he seems to have taken of solacing his grief — that of stealing by means of false keys.

It has generally been considered a great stroke of nature in the poet, where he represents Othello — when those billows were raging and those storms blowing in that great bosom — as going to bed, kissing his wife, and then stifling her to death; and after that comes the superb speech beginning:

“Soft now, a word or two before we part,”

and he kills himself.

But what should we think of Shakespeare, to adopt Mary Hunter's expression, if he had represented Othello as “blowing off a little,” in the first place, by stealing seventeen or eighteen hundred dollars of his father's money? It is hypocrisy, gentlemen, and no truth, no manhood. I submit that the witness is not entitled to the confidence and credit of this jury.

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This man comes here to report words and confessions when he cannot carry a letter from one house to another without sitting down and forging it into a falsehood. He stands here, let me say, in the judgment of this court on the evidence in this position: he receives a letter from the respondent, which he agrees to carry to her husband, that letter which was filled up with new life and new hopes — a new and a dear husband to live for, a future opening before her, a happy meeting next Thursday which she is anxious by all possible attentions to secure to herself — and he cannot bring it before the court without having first elaborately erased from it every word which goes to show an arrangement for such a meeting as that. I repeat that such a man who has not honesty and fairness enough to keep his hands from forgery, is not entitled to bring in words.

There is that beautiful letter; not a word of confession in it; there it is with a key at the end, opening all its sense, and he broke in and stole the key — *stole the key*; not this time a key for the robbery of his father's store, but for the destruction of the daughter's proofs. I pray your judgment, gentlemen, that this is the end of Edward O. Coburn.

From John H. Coburn and Edward O. Coburn to Mary Hunter, whether ascending or descending, is easy — with or without the Latin maxim on that subject. I believe, if you leave the two Coburns out of the case, you will not be troubled by Mary Hunter. I submit that her testimony was mixed

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for her exactly as a man mixes rum and water to drink, and she drank it.

In the bronze, strange woman, what do we behold? From her appearance and her account of herself upon the stand, what do we know that would warrant us to give credit to what she swears to for a moment? Where she came from, with whom she has lived, what has been her way of life, who is the father of her child, to every question which my brother Durant puts under the settled practice of the court, the only means by which perjury of an unknown stranger can be detected — to all these she answers, with her arms akimbo: "It is none of your business."

I submit to you, gentlemen, that the inference is inevitable, if she could have truly and properly answered those questions on her oath, and testified to a chaste, well ordered life, she would have leaped to do it. She would have rejoiced at the opportunity; my learned brother would have instructed her — it would have been his duty to so instruct her — to take her earliest opportunity to tell her history, perhaps a humble one; and I submit to you that no other inference can be made from her reiterated refusal to tell us anything about herself, than that she knows perfectly well that it is one of those rare cases, but which sometimes happen, where "the least said is soonest mended"; and therefore she tells us, "It is none of your business," and that is the end.

Is that a ground for railing at the witness? No,

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but it is a ground for saying that we do not know whether that woman knows anything, or respects in the least degree the sanctity of an oath. We have not a particle of evidence that that foreigner and stranger ever had a lesson from the Bible in her life, that she ever heard a word of counsel from a priest or minister, that she ever heard a mass "by bell, book or candle," that she ever saw a domestic example of purity, that she remembers a father or mother, that she had ever received one single lesson or one single influence which enables us to believe that she, here and now, feels the obligation of an oath.

That she is a foreigner is nothing against her; that being a foreigner we should naturally inquire something about her antecedents was not strange, but it was nothing against her; and if then and there she had frankly disclosed them to us, we might have found her entitled to belief. But she buries herself up, she refuses to tell you anything; and I repeat that you do not know whether from her childhood to this hour she ever had a lesson of virtue from anybody, ever came to understand the importance of truthfulness, the virtue of chastity and the value of character and reputation. I submit that there is no reason for giving to her testimony the least degree of credit.

On reading this entire series of letters, you will find, gentlemen, everywhere, from first to last, perhaps strongest in the first, certainly no stronger

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in the last, continual and reiterated expressions of remorse and regret and grief by Helen Dalton for what she had done. I do not believe my learned brother, upon a collation of that series of letters, will stand up here and contend for a moment that she meant to confess that she had committed the crime of adultery; but, on the contrary, I hold it to be one of the best points in this case for that young wife, I hold it to be a satisfactory evidence, that there is yet a heart and character worth cultivating and saving, that there is yet a wife whom Dalton might be proud and happy to take again to his bed, that no strength of language seems to herself sufficient to express her own remorse and shame for what she has done.

She knew when she penned every one of those letters, she knew perfectly well, from her conversation with her husband and the Daltons on the Sunday evening after the Shawmut Avenue tragedy, that he understood perfectly well that all her strong expressions, all her tears, all her prayers to Almighty God to forgive her for her sin, all her regret that she had failed to make him happy, and failed to be worthy of him, were only the confessions of a pure and chaste heart that judged itself more harshly than God in His infinite mercy will surely judge it, more harshly than the generous and manly heart could judge it. As she looked back to that time, no language seemed too strong, no compunction seemed too severe, no prayer to God seemed too

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profound, no promise of a better life too warm, too strong, too heartfelt, to express it all.

And now I say, for my learned brother to cull out a single one of that series, and put it forward without its context, by itself, and call on you to interpret it as no letter ought to be interpreted, out of its connection, without the *usus loquendi* of the parties themselves, who perfectly understood it, and without which it could not be appreciated — to do that would be a cruelty tremendous, an injustice from which I think he would shrink back.

No, gentlemen, you will take this series from first to last, and I will take my chance of a verdict, or disagreement, as you shall find, that the strongest and clearest expressions of compunction, grief, guilt and sin, shall be found at the beginning of the series. After he had seen them, and studied them, and understood them perfectly well, he writes her again and again that he truly loves her and looks to a happier life yet with the loved one, the trusted one.

I submit that the purer she was and the more confident she felt that her body had been preserved as a vessel of honor for her husband, at the same time the more distinctly and clearly she appreciated the deep wrong she had actually done. I submit that it is according to the nature of love that she shall even overstate, she shall exaggerate and make more of it than it deserves, even of that miserable flirtation which did not end in adultery. It is to lay herself at his feet; it is to show how wholly she feels with

him; it is to assure him of her whole heart laid bare, her whole soul probed to the bottom; and, therefore, it is that you shall find here exaggerated expressions, which, unless you know perfectly well, as the correspondents themselves must have known, their true signification, I apprehend under the rule of law they must be subject to the mildest interpretation which can be put upon them.

Here you have the key to the whole, and thank God, they have not stolen this bar if they have stolen the others: "God knows I love you, darling, forgive that vein of folly, although I have sinned — yet not criminally."

That is the interpretation of the language; and thenceforward it is perfectly understood between the parties that when she says she has sinned, that she has been wicked, that she has been tempted, that the tempter is in his grave, and she is sorry he had not been there before he presented the temptation; it is all perfectly understood between them from beginning to end.

It is the most dreadful cruelty and injustice here and now to desert that perfect understanding; that what she meant was: "I have been sinful by my vanity; I have been secretly tempted by the influence of this young man now in his grave, and I have so far done you a wrong which I shall acknowledge for sin, and pray God while life lasts to forgive me for, but not crime, dear Frank, not crime" — the whole course of the correspondence perfectly understood by

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them — and to read a few extracts from those letters, to show much more strength of affection and a sin which he can never forgive.

She writes: "Frank, you know and God knows that when I married you I was as pure as a child could be, and I am now. Darling Frank, pray our Heavenly Father to forgive me my sins, and let us also feel that in a great degree he has. Frank, when you pray, pray that God will forgive your erring wife. I never expect to have any one love me, I have been so naughty; but then I know Frank will love me, if no one else, won't you, darling?" After that he writes to her again and again and again: "My own sweet Nellie, my darling, I fly to your arms; we shall be happy yet; trust your own affectionate husband."

Then, gentlemen, I submit that the selection of a single paragraph from such a letter as the last, written manifestly under the impression of the great joy the communication of the day before in its results had given her, will not be pursued, or if pursued, will be ineffectual with a candid jury.

Gentlemen, I bring this argument to a close. Positive evidence on behalf of the respondent from the nature of the case we cannot bring. Sumner is in his grave; we cannot bring him; but in that silence we have these two persuasive tests: the testimony of a dying man to his innocence — testimony on that solemn occasion when men and women speak the truth if they ever speak it; and the testimony of Helen Dalton, who declared herself innocent of this

crime; once when her husband, who knew that she was to be trusted, who knew that he could entitle himself to have the joy of belief in her, proposed to her to sink down upon her knees upon the family Bible, and call upon her Heavenly Father to witness whether she spoke the truth, upon which oath propounded by her she declared herself to be innocent; and over again, when the pains of premature delivery came upon her, when, therefore, she was in the very danger and peril of death. We submit the proof that from the testimony in this case, she has been uniformly and steadily constant in that declaration.

The charge of abortion by which they poisoned your own minds for a time, and the public mind for a time, is wholly false and wholly disproved. There is no question whatever about this. The testimony of these Coburns and Mary Hunter, all three, will not weigh a feather for a moment in your minds. And then upon everything else, from one end of the case to the other, every particle of credible testimony, you have the deliberate judgment of the best witnesses on our side.

I leave her case, therefore, upon this statement and respectfully submit that for both their sakes you will render a verdict promptly and joyfully in favor of Helen Dalton — for both their sakes. There is a future for them both together, gentlemen, I think; but if that be not so — if it be that this matter has proceeded so far that her husband's affections have been alienated, and that a happy life in her case has

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become impracticable, yet for all that, let there be no divorce.

I bring to your minds the words of Him Who spake as never man spake: "*Whosoever putteth away his wife*"—for vanity, for coquetry, for levity, for flirtation?—whosoever putteth away his wife for anything short of adultery, intentionally, willingly indulged, and that established by clear, undoubted and credible proof—whosoever does it, "*causeth her to commit adultery.*" If they may be dismissed, then, gentlemen, to live again together, for her sake and her parents' sake sustain her; give her back to self-respect and the assistance of that public opinion which all of us require.

The wife makes no attack upon the husband. Permit me to say that she would have thought it the last drop in this bitterest cup if her own frivolities and vanities had done anything to tempt or even to bring into suspicion the chastity of her husband. It would have been the bitterest drop in her cup. She would say now, as she said to him in her last letter, "You have done all you can to disgrace me, but no matter now—I will not blame you. You are my husband for the present; I will not talk against you nor say aught that can make you unhappy. Wishing you much happiness and peace with much love, if you will accept it, I remain, your wife." So may she remain until that one of them to whom it is appointed first to die shall find the peace of the grave.

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I thank you for your kind indulgence and leave the case in your hands.

The jury could not agree, no divorce was granted, and Mr. Choate had, to that extent, won his case. He won an even greater victory for he convinced the husband of the wife's innocence, and husband and wife were happily reunited.

As a persuasive speaker Rufus Choate possibly never had a superior. That he was remarkably successful as an advocate may be inferred from the remark made by his contemporary Wendell Phillips when he referred to him as "Choate, who made it safe to murder, and of whose health thieves make inquiry before they venture to steal."

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